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West's Key Number Digest

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1. In General

§ 20. Creation and establishment

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 101 to 104

An agency must be created by constitution,[1] by statute,[2] by agency action,[3] or by executive order.[4] Congress,[5] state legislatures,[6] and municipal corporations[7] may create administrative agencies. The executive also may create administrative agencies, especially investigative agencies and particularly under statutes so providing.[8] Sometimes, as in the field of labor relations, federal statutes creating administrative agencies have a parallel in state statutes.[9]

Footnotes

1 League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990); Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977).

2 Kentucky Retirement Systems v. Bowens, 281 S.W.3d 776 (Ky. 2009); League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990); Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977).

3 League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990).

4 Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977).

5 Wiener v. U.S., 357 U.S. 349, 78 S. Ct. 1275, 2 L. Ed. 2d 1377 (1958).

6 East Jeffersontown Imp. Ass'n v. Louisville & Jefferson County Planning & Zoning Commission, 285 S.W.2d 507 (Ky. 1955); Molina v. Games Management Services, 58 N.Y.2d 523, 462 N.Y.S.2d 615, 449 N.E.2d 395, 40 A.L.R.4th 655 (1983); Wall v. Fenner, 76 S.D. 252, 76 N.W.2d 722 (1956).

[7] Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396 (1916).

[8] Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955).

[9] Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947).

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1. In General

§ 21. Definition of “agency” under Federal Administrative Procedure Act

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West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 5, 103.1

Treatises and Practice Aids

As to administrative agencies and their powers, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

For purposes of the Federal Administrative Procedure Act, the term “agency” means each authority of the government of the United States whether or not it is within or subject to review by another agency[1] and whether or not Congress labels it an agency.[2] Certain entities are expressly excluded from the Act[3] while others have been deemed excluded by the courts.[4]

Observation:

The President of the United States is not considered an agency within the meaning of the Administrative Procedure Act.[5]

CUMULATIVE SUPPLEMENT

Cases:

The State Department is an agency for purposes of the Administrative Procedure Act (APA). 5 U.S.C.A. § 551 et seq. Emami v. Nielsen, 365 F. Supp. 3d 1009 (N.D. Cal. 2019).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 551(1).

2 Government Nat. Mortg. Ass’n v. Terry, 608 F.2d 614, 51 A.L.R. Fed. 863 (5th Cir. 1979).

3 5 U.S.C.A. § 551(1)(A) to (H).

4 Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983); Southwest Williamson County Community Ass’n, Inc. v. Slater, 173 F.3d 1033, 1999 FED App. 0158P (6th Cir. 1999); Fund for Animals, Inc. v. Florida Game and Fresh Water Fish Com’n, 550 F. Supp. 1206 (S.D. Fla. 1982).

5 Franklin v. Massachusetts, 505 U.S. 788, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992); Motions Systems Corp. v. Bush, 437 F.3d 1356 (Fed. Cir. 2006).

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§ 22. Definition of “agency” under state administrative procedure acts

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 5, 103.1

The Revised Model State Administrative Procedure Act defines an “agency” as a state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by state law to make rules or to adjudicate. The term does not include the Governor, the legislature body, or the judiciary.[1]

Pursuant to the Model State Administrative Procedure Act, the term “agency” means a board, commission, department, officer, or other administrative unit of the State, including the agency head and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. The term does not include the legislature or the courts or the Governor, as the particular state statute dictates, in the exercise of powers derived directly and exclusively from the constitution of the state. The term does not include a political subdivision of the State or any of the administrative units of a political subdivision but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the State or any of their units. To the extent it purports to exercise authority subject to any provision of the Act, an administrative unit otherwise qualifying as an “agency” must be treated as a separate agency even if the unit is located within or subordinate to another agency.[2]

Under some authority, an “administrative agency” is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.[3]Some state acts require that the agency have statewide jurisdiction.[4]Other state versions define “agency” in terms of particular state programs. In such cases, an “agency” is a body in which the legislature has proposed general powers of administration of a particular state program in connection with which it has been given statutory authority to act for the State in the implementation of that program.[5]Under other state statutes, state entities with the power to hire and fire employees effectively engage in the resolution of contested cases and thus are “agencies” as defined under the statute.[6]

Footnotes

1 Revised Model State Administrative Procedure Act § 102(3) (2010).

2 Model State Administrative Procedure Act § 1-102(1) (1981).

3 Blakely v. Lancaster County, 284 Neb. 659, 825 N.W.2d 149 (2012).

4 Staeheli v. City of St. Paul, 732 N.W.2d 298 (Minn. Ct. App. 2007).

5 Catholic Family and Community Services v. Commission on Human Rights and Opportunities, 3 Conn. App. 464, 489 A.2d 408 (1985).

6 Krentz v. Robertson, 228 F.3d 897 (8th Cir. 2000) (applying Missouri law).

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§ 23. Definition of "agency" under state administrative procedure acts—Agencies as state, not local, entities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 103.1

The state administrative procedure acts generally apply to state entities and not local ones.[1] In fact, the Model State Administrative Procedure Act expressly excludes a political subdivision of the State or any of the administrative units of a political subdivision unless joint or concerted action is involved.[2] Accordingly, governmental entities established by municipalities[3] or counties[4] to perform in a wholly local capacity and to deal with problems on a local basis and which are independent from any statewide system are not state agencies within the meaning of the state acts. For instance, a city council is not an agency under such an act.[5]

Whether an entity is a state agency may depend on the level of state control over the agency. State status is determined by a review of all the relevant characteristics which, when considered together, indicate the overall character of the entity. The fact that an entity is created by statute does not dispositively indicate state status.[6] Nor does the fact that an entity is made an instrumentality of the State for limited purposes make it a state agency; instead, this indicates that the entity should remain independent unless brought within the scope of the directive at issue.[7]

Footnotes

1 Basurto v. Imperial Irrigation District, 211 Cal. App. 4th 866, 150 Cal. Rptr. 3d 145 (4th Dist. 2012); In re City of Shelley, 151 Idaho 289, 255 P.3d 1175 (2011); Lipscomb v. Tucker County Com'n, 197 W. Va. 84, 475 S.E.2d 84 (1996).

2 § 22.

3 Gibson v. Ada County Sheriff's Dept., 139 Idaho 5, 72 P.3d 845 (2003); Hammann v. City of Omaha, 227 Neb. 285,

417 N.W.2d 323 (1987); Izydore v. City of Durham (Durham Bd. of Adjustment), 746 S.E.2d 324 (N.C. Ct. App. 2013), review denied, 749 S.E.2d 851 (N.C. 2013).

[4] Rubinstein v. Sarasota County Public Hosp. Bd., 498 So. 2d 1012 (Fla. 2d DCA 1986); Terrazas v. Blaine County ex rel. Bd. of Com'rs, 147 Idaho 193, 207 P.3d 169 (2009); Vitek v. Bon Homme County Bd. of Com'rs, 2002 SD 100, 650 N.W.2d 513 (S.D. 2002).

[5] Hawkeye Outdoor Advertising, Inc. v. Board of Adjustment of City of Algona, 356 N.W.2d 544 (Iowa 1984).

[6] League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990).
As to the creation of administrative agencies by statute, see § 20.

[7] Cohen v. Board of Trustees of University of Medicine and Dentistry of New Jersey, 240 N.J. Super. 188, 572 A.2d 1191, 59 Ed. Law Rep. 1105 (Ch. Div. 1989).

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§ 24. Agencies as judicial bodies or courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 107

Administrative agencies are not courts.[1] They are not part of the judicial system, nor are they judicial bodies or tribunals.[2] Administrative agencies have no general judicial powers.[3]

A board or tribunal exercises a judicial function, however, if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.[4] Judicial functions performed by administrative agencies or political subdivisions are those with which a court might have been charged in the first instance or functions courts have historically performed or did perform prior to the creation of an administrative body.[5]

Observation:

Administrative agencies often perform judicial or quasi-judicial functions in response to the complexities of modern government, economy, and technology, and this delegation of administrative decisional authority is not only possible but also desirable.[6]

Footnotes

1 Dickinson v. U.S., 346 U.S. 389, 74 S. Ct. 152, 98 L. Ed. 132 (1953); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); Ohio Fresh Eggs, L.L.C. v. Boggs, 183 Ohio App. 3d 511, 2009-Ohio-3551, 917 N.E.2d 833

(10th Dist. Franklin County 2009).

[2] People v. Western Air Lines, 42 Cal. 2d 621, 268 P.2d 723 (1954) (public service commission); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

[3] Murray v. Neth, 279 Neb. 947, 783 N.W.2d 424 (2010).

[4] Hawkins v. City of Omaha, 261 Neb. 943, 627 N.W.2d 118 (2001).

[5] Brown v. Board of Educ., Unified School Dist. No. 333, Cloud County, 261 Kan. 134, 928 P.2d 57, 114 Ed. Law Rep. 1221 (1996).

[6] Mitchell v. Nixon, 351 S.W.3d 676 (Mo. Ct. App. W.D. 2011).
As to quasi-judicial functions in this regard, see § 25.

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§ 25. Agencies as judicial bodies or courts—Quasi-judicial functions

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 108

Administrative proceedings may be considered quasi-judicial if a hearing is held, both parties may participate, the presiding officer has subpoena power over witnesses, and the body has the power to take remedial action.[1] An administrative agency acts in a quasi-judicial manner when the agency hears the view of opposing sides presented in the form of written and oral testimony, examines the record, and makes findings of fact.[2]

As a general matter, whenever an entity which normally acts as a legislative body applies general policy to particular persons in their private capacities, instead of passing on general policy or the rights of individuals in the abstract, it is functioning in a quasi-judicial capacity.[3] A function that is not a true judicial function may be a quasi-judicial function, which involves a discretionary act of a judicial nature taken by a body empowered to investigate facts, weigh evidence, and draw conclusions as the basis for official actions.[4]

Footnotes

1 Boice v. Unisys Corp., 50 F.3d 1145 (2d Cir. 1995) (applying New York law).

2 In re North Metro Harness, Inc., 711 N.W.2d 129 (Minn. Ct. App. 2006).

3 Cabana v. Kenai Peninsula Borough, 21 P.3d 833 (Alaska 2001).
When an administrative board has the power to hear and determine whether a certain state of facts warrants the application of a certain law, it is acting in a quasi-judicial manner. A. Miner Contracting, Inc. v. Toho-Tolani County Imp. Dist., 233 Ariz. 249, 311 P.3d 1062 (Ct. App. Div. 1 2013), review denied, (Mar. 21, 2014).

4 Brown v. Board of Educ., Unified School Dist. No. 333, Cloud County, 261 Kan. 134, 928 P.2d 57, 114 Ed. Law Rep. 1221 (1996).

Quasi-judicial decisions are characterized by: (1) the investigation into a disputed claim and the weighing of evidentiary facts; (2) the application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim. In re Jensen Field Relocation Claims Jensen Field, Inc., 817 N.W.2d 724, 282 Ed. Law Rep. 666 (Minn. Ct. App. 2012).

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1. In General

§ 26. Agencies as legislative or executive

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 105, 106

While administrative agencies are separate from the judicial branch of the government, they do not clearly belong in all cases to either of the other two branches of government although certain administrative agencies are considered agents of the legislative branch of the government.[1]An administrative agency's action is quasi-legislative in nature if it appears that the agency determination is intended to have wide coverage encompassing a large segment of the regulated or general public rather than an individual or a narrow select group.[2]"Quasi-legislative actions," those undertaken by an agency in its legislative capacity, entail the formulation of a rule to be applied to all future cases.[3]

In other cases, specific administrative agencies,[4]or administrative agencies generally,[5]are deemed to be agents of the executive. According to some state courts, an administrative agency can play a dual role: in overseeing and managing its internal operations, it may act in an executive or administrative capacity, and in looking to the future and changing existing conditions by making a new rule to be applied thereafter within some area of its power, an agency exercises a legislative function.[6]

CUMULATIVE SUPPLEMENT

Cases:

While courts have the negative power to disregard an unconstitutional enactment by Congress, they cannot re-write Congress's work by creating offices, terms, and the like; such editorial freedom belongs to the Legislature, not the Judiciary. (Per Chief Justice Roberts, with two justices concurring and four justices concurring in the judgment.) Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Nathanson v. N. L. R. B., 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23 (1952); Central R. Co. of N. J. v. Department of Public Utilities, 7 N.J. 247, 81 A.2d 162 (1951).

2 Northwest Covenant Medical Center v. Fishman, 167 N.J. 123, 770 A.2d 233 (2001).

3 Coachella Valley Unified School Dist. v. State, 176 Cal. App. 4th 93, 98 Cal. Rptr. 3d 9, 247 Ed. Law Rep. 381 (1st Dist. 2009).

4 Brennan v. Black, 34 Del. Ch. 380, 104 A.2d 777 (1954) (school district); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995) (Commission on Law Enforcement and Criminal Justice); Dunham v. Ottinger, 243 N.Y. 423, 154 N.E. 298 (1926) (investigations by attorney general).

5 Barrett v. Tennessee Occupational Safety and Health Review Com'n, 284 S.W.3d 784 (Tenn. 2009).

6 Brown v. Board of Educ., Unified School Dist. No. 333, Cloud County, 261 Kan. 134, 928 P.2d 57, 114 Ed. Law Rep. 1221 (1996).
As to independent agencies, generally, see § 27.

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1. In General

§ 27. Agencies as independent or subordinate

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 104

The term "independent" agency or commission is often used[1] to designate an agency independent of the executive branch.[2] Unlike those federal agencies which are subject to presidential supervision through consultation with the cabinet officers, the many independent agencies are charged by Congress to remain independent of the rest of the executive branch. However, independence does not mean that a commission or agency must ignore or reject positions espoused by the President in order to make an informed decision on matters of national interest.[3] A federal regulatory commission, although independent of executive-branch control, may be required to give consideration to matters which are the responsibility of other federal agencies so that consultation with officials of cabinet departments is encouraged in some instances.[4]

Alternatively, the term "independent" is used to indicate an agency not subject to a superior head of a department or in contrast to "subordinate,"[5] the latter term being applied to bodies whose action is subject to administrative review or revision.[6]

Footnotes

1 Com. ex rel. Banks v. Cain, 345 Pa. 581, 28 A.2d 897, 143 A.L.R. 1473 (1942); Chapel v. Com., 197 Va. 406, 89 S.E.2d 337 (1955).

2 Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081 (1952).

3 Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Com'n, 598 F.2d 759 (3d Cir. 1979).

4 Public Service Commission of State of N. Y. v. Federal Energy Regulatory Commission, 589 F.2d 542 (D.C. Cir. 1978).

5 Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918).

[6] Joseph Burstyn, Inc. v. Wilson, 303 N.Y. 242, 101 N.E.2d 665 (1951), judgment rev'd on other grounds, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).

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A. Introduction

2. Statutes Relating to Agencies

§ 28. Validity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 7

Vesting two agencies with the same power does not necessarily render a statute uncertain and therefore unconstitutional. However, conflict or confusion may arise from possible concurrent exercise of the power.[1]

The general rule that a statute may be constitutional in one part and unconstitutional in another, and if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected,[2]has been applied in the case of statutes relating to administrative agencies.[3]However, where it is not possible to separate that part which is constitutional from that which is unconstitutional, the whole statute must fall.[4]A provision in an administrative law statute that valid portions will be enforced even though it is judicially determined that some part or parts of the statute are invalid is generally carried out by the courts.[5]

Footnotes

1 School Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W. 407, 135 A.L.R. 1081 (1941).

2 Am. Jur. 2d, Constitutional Law § 199.

3 Champlin Refining Co. v. Corporation Com'n of State of Okl., 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403 (1932) (invalid provision for fine and imprisonment); State v. Marana Plantations, Inc., 75 Ariz. 111, 252 P.2d 87 (1953) (unconstitutional delegation of legislative power); Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306, 39 A.L.R.2d 728 (1953).

4 Am. Jur. 2d, Constitutional Law § 199.

5 Oklahoma v. U.S. Civil Service Com'n, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947); Thornbrough v. Williams,

225 Ark. 709, 284 S.W.2d 641 (1955); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).
As to the severability provision found in the Model State Administrative Procedure Act, see § 17.

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2. Statutes Relating to Agencies

§ 29. Defects in administration as ground for attacking statute

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5 to 7

A clear distinction must be made between charges that an act as passed by the legislature is discriminatory, and charges that a commission is enforcing the act in a discriminatory manner.[1] A provision not objectionable on its face may be adjudged unconstitutional because of its effect in operation.[2] However, a statute which is not invalid on its face may not be attacked because of anticipated improper or invalid action in its administration.[3] The possibility that administrative officers will act in defiance of the policy and standards stated in the delegation of authority is not a ground for objection to the delegation.[4] In addition, the failure of a commission to follow necessary procedure in a particular case would at most justify an objection to the administrative determination rather than to the statute itself.[5]

Footnotes

1 Duhame v. State Tax Commission, 65 Ariz. 268, 179 P.2d 252, 171 A.L.R. 684 (1947) (overruled on other grounds by, Valencia Energy Co. v. Arizona Dept. of Revenue, 191 Ariz. 565, 959 P.2d 1256 (1998)).

2 Am. Jur. 2d, Constitutional Law § 177.

3 Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944); Senior Citizens League v. Department of Social Sec. of Wash., 38 Wash. 2d 142, 228 P.2d 478 (1951).

4 Walls v. City of Guntersville, 253 Ala. 480, 45 So. 2d 468 (1950); Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957).

5 American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

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2. Statutes Relating to Agencies

§ 30. Standing to attack constitutionality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5 to 7

The elementary doctrine that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby[1] applies to statutes relating to administrative agencies.[2] The validity of such statutes may not be called into question in the absence of a showing of substantial harm, actual or impending, to a legally protected interest[3] and which directly results from enforcement of the statute.[4]

Footnotes

1 Am. Jur. 2d, Constitutional Law § 136.

2 Plymouth Coal Co. v. Com. of Pennsylvania, 232 U.S. 531, 34 S. Ct. 359, 58 L. Ed. 713 (1914); State v. Friedkin, 244 Ala. 494, 14 So. 2d 363 (1943); State ex rel. State Bd. of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75 (1951).

3 Gange Lumber Co. v. Rowley, 326 U.S. 295, 66 S. Ct. 125, 90 L. Ed. 85 (1945).

4 Board of Trade of City of Chicago v. Olsen, 262 U.S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923); Ex parte Anderson, 191 Or. 409, 229 P.2d 633, 29 A.L.R.2d 1051 (1951).
As to when a public officer may question the constitutionality of a statute or ordinance imposing duties upon him or her, see Am. Jur. 2d, Constitutional Law § 150.

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B. Members and Officers

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2 Am. Jur. 2d Administrative Law § 31

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II. Administrative Agencies

B. Members and Officers

1. In General

§ 31. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 109 to 113

An administrative agency may come into existence before a majority of its members are appointed.[1] Administrative functions may be vested in interested persons[2] and in private persons.[3] Ex officio members of a public body are members for all purposes.[4]

Observation:

A state constitution does not prohibit the appointment of legislators to administrative boards and commissions. These boards and commissions, once members are appointed pursuant to valid legislative enactments in which the principles of bicameralism and presentment have been fulfilled, then may exercise all the powers that administrative agencies have traditionally exercised in both the federal and state systems of government.[5]

Footnotes

1 Liquefied Petroleum Gas Commission v. E. R. Kiper Gas Corp., 229 La. 640, 86 So. 2d 518 (1956).

2 Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950).

[3] Caminetti v. Pacific Mut. Life Ins. Co. of Cal., 22 Cal. 2d 344, 139 P.2d 908 (1943).
As to the number of members necessary to exercise power, see §§ 79, 80.

[4] Louisville & Jefferson County Planning & Zoning Com'n v. Ogden, 307 Ky. 362, 210 S.W.2d 771 (1948).

[5] Almond v. Rhode Island Lottery Com'n, 756 A.2d 186 (R.I. 2000).

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II. Administrative Agencies

B. Members and Officers

1. In General

§ 32. Appointment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 109, 110

In cases where members of an administrative agency are appointed, the members must be appointed in accordance with the constitution[1] and the applicable statutes.[2] The appointing power determines the fitness of the applicant: whether or not he or she is the proper one to discharge the duties of the position. The executive power to appoint members of an agency is unaffected by the rule that the discretion entrusted to an agency must be circumscribed by reasonably definite standards. Likewise, the courts have no general supervising power over appointments.[3] However, appointments must meet the minimal legal standards necessary to comply with the requirements of the statute, and whether such requirements have been met is subject to judicial review.[4]

Footnotes

1 Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); Metropolitan Life Ins. Co. v. Boland, 281 N.Y. 357, 23 N.E.2d 532 (1939).

2 Webb v. Workers' Compensation Com'n, 292 Ark. 349, 730 S.W.2d 222 (1987); Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); Metropolitan Life Ins. Co. v. Boland, 281 N.Y. 357, 23 N.E.2d 532 (1939).

3 Sanza v. Maryland State Bd. of Censors, 245 Md. 319, 226 A.2d 317 (1967).

4 Webb v. Workers' Compensation Com'n, 292 Ark. 349, 730 S.W.2d 222 (1987).

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1. In General

§ 33. Status

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 103.1

Particular officers and members of administrative agencies or bodies which exercise determinative powers have been declared to be executive,[1] administrative, or ministerial officers.[2] For most purposes, there is no distinction between these classifications. The terms are used interchangeably[3] in stating the general rule that such officers are not judicial officers[4] or judges.[5]

Footnotes

1 Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933).

2 State v. Loechner, 65 Neb. 814, 91 N.W. 874 (1902).
As to the status of agencies in this regard, see §§ 24 to 26.

3 Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933).

4 Pigeon v. Employers' Liability Assur. Corp., 216 Mass. 51, 102 N.E. 932 (1913); State v. Loechner, 65 Neb. 814, 91 N.W. 874 (1902).

5 Kentucky & I. Bridge Co. v. Louisville & N.R. Co., 37 F. 567 (C.C.D. Ky. 1889).
Administrative law judges are not subject to the constitutional requirement of elected judges. Wooley v. State Farm Fire and Cas. Ins. Co., 893 So. 2d 746 (La. 2005).

Works.

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1. In General

§ 34. Effect of change in membership

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 114.1, 115

Questions with regard to the effect of a change of membership or personnel arise in connection with the power of an agency to act initially.[1] It has been found that an agency remains the same although its members' terms of office expire, and the board is reconstituted.[2] A change in personnel occurring during the course of or at the close of an administrative hearing does not as such give rise to constitutional repugnance in a decision or order made by the administrative tribunal on the basis of the previous hearing.[3]

Footnotes

1 Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

2 Raymond v. Fish, 51 Conn. 80, 1883 WL 1592 (1883).

3 Wilburn v. Astrue, 626 F.3d 999 (8th Cir. 2010).

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II. Administrative Agencies

B. Members and Officers

2. Disqualification

a. In General

§ 35. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

When will member of federal regulatory board, commission, authority, or similar body be enjoined from participating in rulemaking or adjudicatory proceeding because of "personal bias or other disqualification" under 5 U.S.C.A. sec. 556(b), 51 A.L.R. Fed. 400

The appropriate remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator.[1]An administrative officer may be disqualified by express provision of a statute applicable to the administrative proceeding at issue.[2]In addition, although the applicable due process standards for the disqualification of administrators do not rise to the heights of those prescribed for judicial disqualification,[3]the common-law rule of disqualification extends to administrative officers exercising judicial or quasi-judicial functions[4]such that the mere appearance of impropriety by an administrative officer is to be avoided although that alone is not sufficient to mandate recusal.[5]

The Federal Administrative Procedure Act specifically provides that, in the context of a hearing, a presiding or participating employee may at any time disqualify him- or herself.[6]The Revised Model State Administrative Procedure Act provides that a presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications, or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or agency head.[7]The Model State Administrative Procedure Act provides that any person serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any

other cause provided for in the Act or for which a judge is or may be disqualified.[8]

Practice Tip:

The party asserting grounds for the disqualification of a tainted adjudicator must timely present the objection either before the commencement of the proceeding or as soon as the disqualifying facts become known.[9]

Although agency members may be disqualified from rulemaking proceedings as well, the standards for disqualification are not always the same as in the case of adjudication. The burden of proof on parties seeking to disqualify agency members from rulemaking proceedings is higher because of the constitutionally mandated deference to an administrative agency's legislative prerogatives. Parties must support their motion to disqualify by clear and convincing evidence.[10]

Footnotes

1 In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000).

2 In re Weston Benefit Assessment Special Road Dist. of Platte County, 294 S.W.2d 353 (Mo. Ct. App. 1956).

3 Spitz v. Board of Examiners of Psychologists, 127 Conn. App. 108, 12 A.3d 1080 (2011).
As to the disqualification of judges to act in a particular case, generally, see Am. Jur. 2d, Judges §§ 86 to 167.

4 Regan v. State Bd. of Chiropractic Examiners, 355 Md. 397, 735 A.2d 991 (1999).

5 Grant v. Senkowski, 146 A.D.2d 948, 537 N.Y.S.2d 323 (3d Dep't 1989).
As to the disqualification of hearing officers for bias, see §§ 305, 306.

6 5 U.S.C.A. § 556(b).
As to the procedure for disqualification, see § 306.
As to administrative hearings, generally, see §§ 289 to 345.

7 Revised Model State Administrative Procedure Act § 402(c) (2010).
As to disqualification for bias, generally, see §§ 38 to 40.

8 Model State Administrative Procedure Act § 4-202(b) (1981).

9 In re Public Utilities Com'n, 125 Haw. 210, 257 P.3d 223 (Ct. App. 2011).

10 Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

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2. Disqualification

a. In General

§ 36. Effect of disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

The general rule in the federal courts has been that, except in limited circumstances, Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by prior constraint,[1] and where issues relative to disqualification are essentially questions of fact, rather than law, proper occasion for court involvement is upon judicial review of agency action in order to avoid undue delay in the administrative determination. Nevertheless, some courts have found that where the issues in question are purely legal,[2] continued participation would amount to a denial of due process;[3] or upon balancing the variable factors in the case, and equity so requires,[4] an injunction is appropriate.

Some state courts adopt a less restrictive approach to injunctions. Such courts find that disqualification may furnish grounds for compelling the officer to recuse him- or herself from sitting in the proceeding if he or she does not voluntarily retire,[5] or for enjoining an officer from participation,[6] or for prohibiting a board, one member of which is disqualified, from proceeding.[7]

A determination made or participated in by a disqualified officer is merely voidable where only the common-law rule as to disqualification is violated,[8] and the proceeding is reviewable.[9] However, if participation by a disqualified officer is prohibited by statute, the determination may be void.[10]

Footnotes

1 Securities and Exchange Commission v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963).

2 Davis v. Secretary, Dept. of Health, Ed. and Welfare, 262 F. Supp. 124 (D. Md. 1967), judgment aff'd, 386 F.2d 429 (4th Cir. 1967).

[3] Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962).

[4] Davis v. Secretary, Dept. of Health, Ed. and Welfare, 262 F. Supp. 124 (D. Md. 1967), judgment aff'd, 386 F.2d 429 (4th Cir. 1967); Leyden v. Federal Aviation Administration, 315 F. Supp. 1398 (E.D. N.Y. 1970).

[5] State v. Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470 (1925).

[6] Sussel v. City and County of Honolulu Civil Service Com'n, 71 Haw. 101, 784 P.2d 867 (1989).

[7] State ex rel. Barnard v. Board of Educ. of City of Seattle, 19 Wash. 8, 52 P. 317 (1898).

[8] City of Naperville v. Wehrle, 340 Ill. 579, 173 N.E. 165, 71 A.L.R. 535 (1930); Stahl v. Board of Sup'rs of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920).

[9] Carr v. Duhme, 167 Ind. 76, 78 N.E. 322 (1906).

[10] Stahl v. Board of Sup'rs of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920); In re Weston Benefit Assessment Special Road Dist. of Platte County, 294 S.W.2d 353 (Mo. Ct. App. 1956).

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2. Disqualification

a. In General

§ 37. Effect of disqualification—Continuation of proceedings; application of "rule of necessity"

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

Construction and Application of Rule of Necessity Providing that Administrative or Quasi-judicial Officer Is Not Disqualified to Determine a Matter Because of Bias or Personal Interest if Case Cannot Be Heard Otherwise, 28 A.L.R.6th 175

Due process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make.[1] Under such circumstances, the so-called "rule of necessity" permits an adjudicative body to proceed in spite of its possible bias or self-interest.[2] The rule of necessity not only allows but also requires a decision maker to act in a proceeding when he or she would otherwise be disqualified if jurisdiction is exclusive, and no provision exists for substitution.[3]

Observation:

The rule of necessity applies only in situations where the sole adjudicatory body would be precluded from carrying out its function because of disqualifications.[4] It is not implicated where recusals based on bias do not deprive the administrative body of a quorum.[5]

There are ways of relieving the injustice of permitting a biased administrative decision. Whenever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, without altering the law about scope of review, may and probably should review with special intensity. It makes no sense to show the extreme deference of viewing the evidence in the light most favorable to an administrative body which is not completely impartial.[6]However, this does not mean that the court should undertake a de novo review.[7]The court's standard of review should be deferential, but it should also compensate for the possibility that bias may have tainted the agency's exercise of its expertise. Accordingly, the decision of a biased administrative agency acting under the rule of necessity should be upheld if the evidence presented at the administrative hearing would have entitled an objective decision maker to reach the same conclusion.[8]

Footnotes

1 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

2 In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000); Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

3 In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000).

4 Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997); In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000).

5 Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997).

6 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

7 Barker v. Secretary of State's Office of Missouri, 752 S.W.2d 437 (Mo. Ct. App. W.D. 1988).

8 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

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2. Disqualification

b. Particular Grounds

§ 38. Bias

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision, 4 A.L.R.6th 263

When will member of federal regulatory board, commission, authority, or similar body be enjoined from participating in rulemaking or adjudicatory proceeding because of "personal bias or other disqualification" under 5 U.S.C.A. sec. 556(b), 51 A.L.R. Fed. 400

Administrative decision makers must be impartial.[1]The right to a hearing before an unbiased and impartial administrative decision maker is the basic requirement of due process and of the statutes.[2]The Federal Administrative Procedure Act provides that in administrative hearings, the functions of presiding employees and of employees participating in decisions must be conducted in an impartial manner.[3]The Revised Model State Administrative Procedure Act and the Model State Administrative Procedure Act likewise provide for the disqualification of presiding officers due to bias.[4]

Actual bias, rather than the mere potential for bias, must be shown in order to disqualify a hearing tribunal.[5]Generally, the test for bias is whether the circumstances of the case could reasonably be interpreted as having the likely capacity to tempt the official to depart from a strong public duty.[6]Bias or prejudice of an agency decision maker related to an issue of law or policy is not disqualifying; however, personal bias or prejudice going beyond sincere political and philosophical views is another matter.[7]Not all allegations of bias or prejudice are of the type that render a proceeding fundamentally unfair or require the disqualification of a decision maker.[8]To be disqualifying, the alleged bias of an administrative law judge must stem from an

extrajudicial source or must demonstrate a deep-seated antagonism or favoritism that would make a fair judgment impossible[9]and result in an opinion on the merits on some basis other than what the judge learned from participation in the case.[10]A substantial showing of personal bias is required to disqualify a hearing officer.[11]

Observation:

The test for bias in rulemaking proceedings is different than in adjudication because rulemaking is the type of proceeding where an agency member's policy biases gained from experience and expertise become an integral part of the process.[12]

CUMULATIVE SUPPLEMENT

Cases:

Due process requires that administrative proceedings in New Mexico be administered by fair and impartial triers of fact who are at a minimum, disinterested and from any form of bias or predisposition regarding outcome of case. U.S.C.A. Const.Amend. 14. Lujan v. City of Santa Fe, 89 F. Supp. 3d 1109 (D.N.M. 2015).

The rule of necessity provides a limited exception to the requirement of an unbiased adjudicator for an administrative proceeding by requiring a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard. Zlotnick v. City of Saratoga Springs, 122 A.D.3d 1210, 997 N.Y.S.2d 809 (3d Dep't 2014).

[END OF SUPPLEMENT]

Footnotes

1 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

2 § 292.

3 5 U.S.C.A. § 556(b).
As to disqualification for bias in the hearing context, generally, see § 305.
As to the procedure for disqualification for bias in the hearing context, see § 306.

4 § 35.

5 Jones v. Connecticut Medical Examining Bd., 129 Conn. App. 575, 19 A.3d 1264 (2011), judgment aff'd, 309 Conn. 727, 72 A.3d 1034 (2013); Felder v. Charleston County School Dist., 327 S.C. 21, 489 S.E.2d 191, 120 Ed. Law Rep. 616 (1997).

6 Matter of Bergen County Utilities Authority, 230 N.J. Super. 411, 553 A.2d 849 (App. Div. 1989).

7 Colao v. County Council of Prince George's County, 109 Md. App. 431, 675 A.2d 148 (1996), aff'd, 346 Md. 342, 697 A.2d 96 (1997).

[8] Alb. Bernalillo Co. Water Utility Authority v. NMPRC, 2010-NMSC-013, 148 N.M. 21, 229 P.3d 494 (2010).

[9] Reddy v. Commodity Futures Trading Com'n, 191 F.3d 109 (2d Cir. 1999).

[10] First Nat. Monetary Corp. v. Weinberger, 819 F.2d 1334 (6th Cir. 1987).

[11] Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000); St. Anthony Hosp. v. U.S. Dept. of Health and Human Services, 309 F.3d 680 (10th Cir. 2002).

[12] Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

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2. Disqualification

b. Particular Grounds

§ 39. Bias—Prejudgment of law or facts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

The standard for disqualification due to prejudgment is different in adjudication proceedings and rulemaking proceedings.[1] An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding in which he or she has prejudged the case.[2] Any administrative decision maker who has made an unalterable prejudgment of operative adjudicative facts is considered biased.[3] The test for disqualification is whether a disinterested observer may conclude that the agency, or its members, have in some measure adjudged the facts, as well as the law, of a case in advance of hearing it.[4]

Observation:

Administrative officials may question witnesses and possess preconceived views on the legal and policy issues before them.[5] In the course of adjudicative proceedings, decision makers frequently make preliminary or collateral determinations against a party, and absent persuasive evidence of factual bias, there is no reason to assume that these decision makers thereby lose their objectivity.[6]

In rulemaking proceedings, the standard for prejudgment is not the same as in adjudications. Bias in the form of a crystallized point of view on issues of law or policy is rarely, if ever, sufficient to disqualify.[7] The standard for disqualifying an agency official from participating in rulemaking proceedings for prejudgment is substantial, and potentially disqualifying statements by an official must be considered as a whole.[8]

Footnotes

[1] Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

[2] Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000); Kramarski v. Board of Trustees of Village of Orland Park Police Pension Fund, 402 Ill. App. 3d 1040, 341 Ill. Dec. 954, 931 N.E.2d 851 (1st Dist. 2010).

[3] Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997); Financial Solutions and Associates v. Carnahan, 316 S.W.3d 518 (Mo. Ct. App. W.D. 2010).

[4] Board of Educ. of Rich Tp. High School Dist. No. 227 v. Illinois State Bd. of Educ., 2011 IL App (1st) 110182, 358 Ill. Dec. 285, 965 N.E.2d 13, 279 Ed. Law Rep. 391 (App. Ct. 1st Dist. 2011).

[5] In re Rattee, 145 N.H. 341, 761 A.2d 1076 (2000).

[6] Dodds v. Commission on Judicial Performance, 12 Cal. 4th 163, 48 Cal. Rptr. 2d 106, 906 P.2d 1260 (1995).

[7] Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

[8] Housing Study Group v. Kemp, 736 F. Supp. 321 (D.D.C. 1990), order clarified, 739 F. Supp. 633 (D.D.C. 1990).

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2. Disqualification

b. Particular Grounds

§ 40. Bias—Proof and presumptions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

It is assumed that administrative decision makers will serve with fairness and integrity.[1]There is a presumption that they are objective[2]and capable of fairly judging a particular controversy on the basis of its own circumstances.[3]In addition, there is a presumption of honesty, integrity,[4]good faith,[5]and impartiality[6]in those serving as adjudicators, which presumption is only rebutted by a showing of some substantial countervailing reason to conclude that a decision maker is actually biased with respect to the factual issues being adjudicated.[7]To overcome the presumption of impartiality, the plaintiff must demonstrate either actual bias[8]or the existence of circumstances indicating a probability of bias too high to be constitutionally tolerable.[9]

CUMULATIVE SUPPLEMENT

Cases:

County employee failed to overcome presumption that hearing officer was free from bias and establish that officer prejudged charges against employee by administrator of nursing home, notwithstanding that officer presided over prior related hearing for employee. Bruso v. Clinton County, 139 A.D.3d 1169, 31 N.Y.S.3d 277 (3d Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

[1] Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 136 Ill. Dec. 47, 544 N.E.2d 733 (1989).

[2] Simko v. Ervin, 234 Conn. 498, 661 A.2d 1018 (1995); In re Cross, 617 A.2d 97 (R.I. 1992); Voeltz v. John Morrell & Co., 1997 SD 69, 564 N.W.2d 315 (S.D. 1997).

[3] Lichoulas v. F.E.R.C., 606 F.3d 769 (D.C. Cir. 2010); Kramarski v. Board of Trustees of Village of Orland Park Police Pension Fund, 402 Ill. App. 3d 1040, 341 Ill. Dec. 954, 931 N.E.2d 851 (1st Dist. 2010).

[4] Hasie v. Office of Comptroller of Currency of U.S., 633 F.3d 361 (5th Cir. 2011); Fleming v. Civil Service Com'n of Douglas County, 280 Neb. 1014, 792 N.W.2d 871 (2011); Champlin's Realty Associates v. Tikoian, 989 A.2d 427 (R.I. 2010).

[5] Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000).

[6] Gottstein v. State, Dept. of Natural Resources, 223 P.3d 609 (Alaska 2010); Morongo Band of Mission Indians v. State Water Resources Control Bd., 45 Cal. 4th 731, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009); State ex rel. Praxair, Inc. v. Missouri Public Service Com'n, 344 S.W.3d 178 (Mo. 2011).

[7] Harline v. Drug Enforcement Admin., 148 F.3d 1199 (10th Cir. 1998).
A party seeking to disqualify an adjudicator in administrative agency proceedings on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. Fleming v. Civil Service Com'n of Douglas County, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[8] Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); Bunnell v. Barnhart, 336 F.3d 1112 (9th Cir. 2003); Clisham v. Board of Police Com'rs of Borough of Naugatuck, 223 Conn. 354, 613 A.2d 254 (1992).

[9] Transportation General, Inc. v. Department of Ins., State of Conn., 236 Conn. 75, 670 A.2d 1302 (1996); Northwestern Bell Telephone Co., Inc. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990).

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II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 41. Improper receipt of evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

Although an administrative official does not become impartial or unfair merely through becoming familiar with the facts of the case through the performance of a statutory or administrative duty,[1] disqualification may result from evidence being improperly received. In such a situation, disqualification depends on the facts and circumstances of each case.[2] Some courts allow a decision maker to have a dual role as a witness at one step of the proceedings and as a member of a reviewing body at a later stage of the same proceedings.[3]

Footnotes

1 Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976); Matter of Carberry, 114 N.J. 574, 556 A.2d 314 (1989).

2 Collura v. Board of Police Com'rs of Village of Itasca, 113 Ill. 2d 361, 101 Ill. Dec. 640, 498 N.E.2d 1148 (1986).

3 Mountain States Tel. and Tel. Co. v. Public Utilities Com'n of State of Colo., 763 P.2d 1020 (Colo. 1988).

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II. Administrative Agencies

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§ 42. Involvement in investigation or prosecution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

There is authority to the effect that an administrative officer may be disqualified from adjudication where he or she is on the investigative or prosecuting staff in the case.[1] In fact, pursuant to both the Revised Model State Administrative Procedure Act and the Model State Administrative Procedure Act, a person who has served as an investigator, prosecutor, or advocate in a contested case, or an adjudicative proceeding or in its preadjudicative stage, as the case may be, or persons subject to the authority, direction, or discretion of such person may not serve as a presiding officer or assist or advise a presiding officer in the same proceeding.[2]

Under some authority, however, agency members who participate in an investigation, particularly a nonadversarial one, are not in all cases disqualified from adjudicating.[3] When an assertion of bias is premised solely on an administrative adjudicator's exercise of both investigative and adjudicative functions, the party claiming bias must show that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[4]

Footnotes

1 Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962).

2 Model State Administrative Procedure Act § 4-214(a), (b) (1981); Revised Model State Administrative Procedure Act § 402(b) (2010).

[3] Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

[4] Hasie v. Office of Comptroller of Currency of U.S., 633 F.3d 361 (5th Cir. 2011); Moncier v. Board of Professional Responsibility, 406 S.W.3d 139 (Tenn. 2013).

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II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 43. Personal or pecuniary interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

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Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision, 4 A.L.R.6th 263

Members of an administrative agency must be able to perform the duties of office free of an interest, personal or pecuniary, having the potential to influence their judgment.[1] Thus, an administrative officer generally is disqualified from acting as a decision maker if he or she has a personal or pecuniary interest in the proceedings.[2] The Revised Model State Administrative Procedure Act requires disqualification for "financial interest," and the Model State Administrative Procedure Act requires disqualification for "interest."[3]

A direct, personal, and substantial pecuniary interest exists requiring the disqualification of a judge or temporary administrative hearing officer when the income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions.[4] A personal interest need not be pecuniary; rather, it is any interest which can be viewed as having a potentially debilitating effect on the impartiality of the decision maker.[5] An administrative official also may be disqualified where he or she has a familial relationship with one of the parties[6] or where he or she is biased, is prejudiced, or labors under personal animosity toward a party.[7]

Footnotes

1 Matter of Bergen County Utilities Authority, 230 N.J. Super. 411, 553 A.2d 849 (App. Div. 1989).

2 In re Khan, 804 N.W.2d 132 (Minn. Ct. App. 2011); Fulce v. Public Employees Retirement System of Mississippi, 759 So. 2d 401 (Miss. 2000); Appeal of the Local Government Center, Inc., 85 A.3d 388 (N.H. 2014).

3 § 35.

4 Haas v. County of San Bernardino, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (2002).

5 Waste Management of Illinois, Inc. v. Pollution Control Bd., 175 Ill. App. 3d 1023, 125 Ill. Dec. 524, 530 N.E.2d 682 (2d Dist. 1988).

6 In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).

7 Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000).

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2. Disqualification

b. Particular Grounds

§ 44. Target of criticism by party involved

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

Where the adjudicator in an administrative proceeding has been the target of personal abuse or criticism by an involved party, the probability of actual bias is too high to be constitutionally tolerable[1] and is grounds for disqualification.[2] Vituperative criticism of an adjudicator by a charged party prior to the filing of administrative charges may present an unacceptably high risk of creating bias on the part of the adjudicator. However, a contentious atmosphere can be expected in many administrative hearings, and an attitude bordering on partisanship, or even hostility, as reflected in exchanges between the adjudicator and the charged party does not in and of itself prove bias.[3]

Footnotes

1 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

2 Matter of Carberry, 114 N.J. 574, 556 A.2d 314 (1989).

3 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301 to 309.1, 316, 318, 322.1 to 328, 331, 428 to 437

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West's A.L.R. Digest, Administrative Law and Procedure 8, 103.1, 301 to 309.1, 316, 318, 322.1 to 328, 331, 428 to 437

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1. In General

§ 45. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 301 to 309.1

The primary function of administrative agencies is to carry into effect the will of the State as expressed by its legislation.[1]Administrative agencies are vested with the responsibility to consistently interpret guidelines to avoid arbitrary and capricious results.[2]Broadly speaking, agencies are expected to consider reasonable alternatives to proposed actions[3]and, in doing so, are permitted to assess the wisdom of their policies on a continuing basis.[4]

While some agencies act merely as investigative or advisory bodies,[5]administrative agencies may have executive, administrative, investigative, legislative, or adjudicative powers.[6]In addition, some statutory schemes provide for or permit administrative enforcement,[7]and some agencies are given express authority to reconsider, amend, correct, or modify orders that would otherwise be final or to monitor conditions over time to best implement a particular statutory scheme.[8]

Whether a particular administrative agency has a certain power is primarily a matter of statutory construction.[9]The fact that an asserted power is novel and unprecedented does not mean that it does not exist.[10]An agency may act within its authority even if its action is later determined to be legally erroneous.[11]

Footnotes

1 Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941); Rosenthal v. State Emp. Retirement System, 30 N.J. Super. 136, 103 A.2d 896 (App. Div. 1954).

2 Biloxi HMA, Inc. v. Singing River Hosp., 743 So. 2d 979 (Miss. 1999).

3 Central Maine Power Co. v. F.E.R.C., 252 F.3d 34 (1st Cir. 2001).

[4] SKF USA Inc. v. U.S., 254 F.3d 1022 (Fed. Cir. 2001).

[5] Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, 168 A.L.R. 1181 (1945); In re Di Brizzi, 303 N.Y. 206, 101 N.E.2d 464 (1951).

[6] Yesson v. San Francisco Municipal Transportation Agency, 224 Cal. App. 4th 108, 168 Cal. Rptr. 3d 212 (1st Dist. 2014).

[7] Allen v. Grand Central Aircraft Co., 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954).

[8] 1000 Friends of Oregon v. Land Conservation and Development Com'n, 301 Or. 622, 724 P.2d 805 (1986).

[9] State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).
As to the administrative construction of statutes, see §§ 67 to 73.

[10] U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

[11] Custer County Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001).

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1. In General

§ 46. Characterization and classification of administrative powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 326

Administrative powers are executive, legislative, or judicial in nature although not specifically allocated.[1]Administrative power is the power to administer or enforce a law, as opposed to the legislative power to make a law.[2]Administration has to do with the carrying of laws into effect, that is, their practical application to current affairs, in accordance with and in execution of the principles prescribed by the lawmaker.[3]Thus, regulatory and control powers of an administrative agency are frequently described as "administrative."[4]The power of an administrative agency to make rules to carry out a policy is administrative.[5]The application of such rules in particular cases is executive or administrative in nature.[6]

Observation:

The issue of an administrative body's authority presents a question of law and not a question of fact.[7]

Footnotes

1 Guiseppi v. Walling, 144 F.2d 608, 155 A.L.R. 761 (C.C.A. 2d Cir. 1944), judgment aff'd, 324 U.S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945).

2 Citizens' Utility Ratepayer Bd. v. State Corp. Com'n of State of Kan., 264 Kan. 363, 956 P.2d 685 (1998).

[3] Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 (1913); Robertson v. Schein, 305 Ky. 528, 204 S.W.2d 954 (1947).

[4] Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403, 94 L. Ed. 381 (1950); Guthrie v. Curlin, 263 S.W.2d 240 (Ky. 1953).

[5] U.S. v. Grimaud, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); Knudsen Creamery Co. of Cal. v. Brock, 37 Cal. 2d 485, 234 P.2d 26 (1951); Department of Public Welfare v. National Help "U" Ass'n, 197 Tenn. 8, 270 S.W.2d 337 (1954).

[6] Gulf, M. & O. R. Co. v. Railroad and Public Utilities Com'n, 38 Tenn. App. 212, 271 S.W.2d 23 (1954).

[7] County of Knox ex rel. Masterson v. Highlands, L.L.C., 188 Ill. 2d 546, 243 Ill. Dec. 224, 723 N.E.2d 256 (1999).

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1. In General

§ 47. Source of powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305

Being creatures of the legislature,[1] administrative agencies have no general or common-law powers[2] but only those powers conferred upon them by statute or constitution.[3] An agency must act in accordance with the applicable statutes and its own regulations.[4] Apart from the instances in which an administrative agency is created and empowered by a provision of a state constitution or an executive order,[5] the source of the powers of administrative agencies lies in statutes,[6] and administrative agencies must find within the statutes warrant for the exercise of any authority which they claim.[7]

CUMULATIVE SUPPLEMENT

Cases:

Administrative agencies have no general or common-law powers, but only such as have been conferred upon them by law expressly or by implication. PNGI Charles Town Gaming, LLC v. West Virginia Racing Com'n, 765 S.E.2d 241 (W. Va. 2014).

[END OF SUPPLEMENT]

Footnotes

[1] In re Hubbard, 778 N.W.2d 313 (Minn. 2010); New York State Superfund Coalition, Inc. v. New York State Dept. of

Environmental Conservation, 18 N.Y.3d 289, 938 N.Y.S.2d 266, 961 N.E.2d 657 (2011); Texas Natural Resource Conservation Com'n v. Lakeshore Utility Co., Inc., 164 S.W.3d 368 (Tex. 2005).

[2] Woodard v. Jefferson County, 18 Fed. Appx. 706 (10th Cir. 2001); Gaffney v. Board of Trustees of Orland Fire Protection Dist., 2012 IL 110012, 360 Ill. Dec. 549, 969 N.E.2d 359 (Ill. 2012).
As to implied and inherent powers, generally, see § 54.

[3] § 51.

[4] Paralyzed Veterans of America v. West, 138 F.3d 1434 (Fed. Cir. 1998).

[5] § 20.

[6] Florida Elections Commission v. Davis, 44 So. 3d 1211 (Fla. 1st DCA 2010); Adamson v. Correctional Medical Services, Inc., 359 Md. 238, 753 A.2d 501 (2000).
The terms of the enabling statute establish the scope of agency authority. Yeboah v. U.S. Dept. of Justice, 345 F.3d 216 (3d Cir. 2003).

[7] M & J Garage and Towing, Inc. v. West Virginia State Police, 227 W. Va. 344, 709 S.E.2d 194 (2010); Exxon Mobil Corp. v. Wyoming Dept. of Revenue, 2011 WY 161, 266 P.3d 944 (Wyo. 2011).
As to statutes relating to administrative agencies, generally, see §§ 28 to 30.

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1. In General

§ 48. Source of powers—Legislative standards

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 301, 305

A statute or ordinance placing discretionary power in an administrative agency must furnish standards for those who administer such power.[1]The law must enunciate standards to guide the administrative officers where the legislature delegates to an administrative agency the power to determine a fact or state of things upon which an application of the law depends.[2]The standards which must accompany such a grant of power must not be unlimited, be unreasonable, or permit arbitrary action by the administrative body.[3]Failure to determine such standards may render the statute void.[4]

Observation:

While adequate standards must be included in the delegating legislation,[5]the realities of modern legislation dealing with complex economic and social problems have led to judicial approval of broad standards for administrative actions.[6]Detailed standards are not required, especially in regulatory enactments under the police power.[7]

CUMULATIVE SUPPLEMENT

Cases:

Scope of provision of Affordable Care Act (ACA) prohibiting Department of Health and Human Services (HHS) from promulgating regulation that creates unreasonable barrier to ability of individuals to obtain appropriate medical care was not limited to ACA. 42 U.S.C.A. § 18114. State v. Azar, 385 F. Supp. 3d 960 (N.D. Cal. 2019), stay pending appeal denied, 2019 WL 2029066 (N.D. Cal. 2019) and stay pending appeal denied, 2019 WL 2996441 (N.D. Cal. 2019).

The Legislature may constitutionally delegate its legislative powers to an administrative body so long as it sets forth a policy, rule, or standard for guidance and does not vest them with an arbitrary and uncontrolled discretion. State v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590 (2015).

To withstand the charge of unconstitutional delegation of legislative power to an administrative agency, a statute must establish reasonable standards to govern the achievement of its purpose and the execution of the power that it confers to the agency. Chittenden County Sheriff's Department v. Department of Labor, 2020 VT 4, 228 A.3d 85 (Vt. 2020).

[END OF SUPPLEMENT]

Footnotes

[1] Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012); Texas Workers' Compensation Com'n v. Patient Advocates of Texas, 136 S.W.3d 643 (Tex. 2004).
As to discretionary power in this regard, see §§ 55, 56.

[2] In re McClain, 741 S.E.2d 893 (N.C. Ct. App. 2013), review denied, 743 S.E.2d 188 (N.C. 2013); Fahn v. Cowlitz County, 93 Wash. 2d 368, 610 P.2d 857 (1980), opinion amended on other grounds, 621 P.2d 1293 (Wash. 1981).

[3] State v. Union Tank Car Co., 439 So. 2d 377 (La. 1983).

[4] Balmoral Racing Club, Inc. v. Illinois Racing Bd., 151 Ill. 2d 367, 177 Ill. Dec. 419, 603 N.E.2d 489 (1992).

[5] Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012); Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).

[6] Kaufman v. State Dept. of Social and Rehabilitative Services, 248 Kan. 951, 811 P.2d 876 (1991); State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

[7] State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

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§ 49. Source of powers—Ratification and validation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1

Acts of administrative agencies unauthorized at the time may become valid and binding by ratification[1] unless the attempted ratification is made at a time when the ratifying authority could not lawfully do the act, or there are substantial intervening rights.[2] The fact that a validating act is retroactive does not, in itself, render it ineffective.[3] When the legislature ratifies the act, it becomes the act of the legislature, eliminating any question of delegation.[4]

Ratification may be implied as well as express.[5] However, whether there is an implied ratification depends on the circumstances of the case. Implied ratification is insufficient to show a delegation of authority to take action within an area of questionable constitutionality[6] or to eliminate limitations upon the powers of an agency.[7]

Footnotes

1 Ex parte Mitsuye Endo, 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243 (1944); Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957, 66 A.L.R.2d 718 (1st Dist. 1958) (disapproved of on other grounds by, Wong v. Di Grazia, 60 Cal. 2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963)).

2 Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage Dist., 258 U.S. 338, 42 S. Ct. 325, 66 L. Ed. 647 (1922).

3 Swayne & Hoyt v. U.S., 300 U.S. 297, 57 S. Ct. 478, 81 L. Ed. 659 (1937).

4 City of Harrison v. Snyder, 217 Ark. 528, 231 S.W.2d 95 (1950).

5 See Hirabayashi v. U.S., 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).

[6] Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959).

[7] Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955).

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§ 50. Construction of statutes granting powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305

Some courts find that statutes granting powers to agencies must be strictly construed as conferring only those powers stated or necessarily implied,[1] in order to preclude the exercise of a power which is not expressly granted.[2] However, other courts consider that authority given to an agency should be liberally construed in order to permit the agency to carry out its statutory responsibilities[3] and that incidental powers should be readily implied.[4] Moreover, where the agency is concerned with protecting the public health and welfare, the delegation of authority to the agency is liberally construed.[5]

CUMULATIVE SUPPLEMENT

Cases:

Whether judicial power is reasonably necessary as an incident to accomplishment of the purposes for which an administrative office or agency was created must be determined in each instance in light of the purpose for which agency was established and in light of nature and extent of judicial power undertaken to be conferred. West's N.C.G.S.A. Const. Art. 4, § 3. Kindsgrab v. State Bd. of Barber Examiners, 763 S.E.2d 913 (N.C. Ct. App. 2014).

[END OF SUPPLEMENT]

Footnotes

[1] In re Indiana Michigan Power Co., 297 Mich. App. 332, 824 N.W.2d 246 (2012), appeal denied, 493 Mich. 946, 827 N.W.2d 723 (2013); Governor's Policy Research Office v. KN Energy, 264 Neb. 924, 652 N.W.2d 865 (2002); Mayland v. Flitner, 2001 WY 69, 28 P.3d 838 (Wyo. 2001).

[2] Racine Fire and Police Commission v. Stanfield, 70 Wis. 2d 395, 234 N.W.2d 307 (1975).

[3] In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 22 A.3d 94 (App. Div. 2011).

[4] § 54.

[5] Pennsylvania Builders Ass'n v. Department of Labor and Industry, 4 A.3d 215 (Pa. Commw. Ct. 2010); City of Columbia v. Board of Health and Environmental Control, 292 S.C. 199, 355 S.E.2d 536 (1987).

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1. In General

§ 51. General limitations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305 to 307

A determination of the limits of an agency's authority requires the construction of the agency's enabling statute.[1]An administrative agency only has those powers expressly conferred upon it by statute[2]or constitution[3]and such as are implied by their grant of authority.[4]Confining delegated lawmaking authority within its intended bounds helps to assure that ultimate control over policymaking rests with the legislative branch of government rather than with unelected administrative officials.[5]

An agency has no power to act in conflict with the authority granted to it by the legislature[6]or outside of its own regulations.[7]In addition, an agency may not exceed its statutory authority[8]or constitutional limitations,[9]and administrative actions exceeding authority delegated by law are void.[10]An agency cannot expand its granted powers by its own authority,[11]nor can it confer jurisdiction upon itself.[12]

Observation:

Concern that agency interpretation of a statute exceeds the limits of power granted by Congress is heightened where the interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.[13]

CUMULATIVE SUPPLEMENT

Cases:

Unlike an agency's interpretation of ambiguous statutory terms or its own regulations, an agency has no special competence or role in interpreting a judicial decision. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015).

When Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account. Murray Energy Corporation v. Environmental Protection Agency, 936 F.3d 597 (D.C. Cir. 2019).

Subject to equitable defenses including laches, a governmental action may be challenged at any time, as ultra vires, when the action itself is beyond the jurisdiction or authority of the administrative body to act. Dubois Livestock, Inc. v. Town of Arundel, 2014 ME 122, 103 A.3d 556 (Me. 2014).

[END OF SUPPLEMENT]

Footnotes

1 Brzowski v. Maryland Home Imp. Com'n, 114 Md. App. 615, 691 A.2d 699 (1997).
As to the construction of statutes granting powers, see § 50.

2 Stiger v. Flippin, 201 Cal. App. 4th 646, 135 Cal. Rptr. 3d 168 (4th Dist. 2011), review denied, (Mar. 14, 2012); Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).

3 American Federation of Labor v. Unemployment Ins. Appeals Bd., 13 Cal. 4th 1017, 56 Cal. Rptr. 2d 109, 920 P.2d 1314 (1996); Oklahoma Public Employees Ass'n v. Oklahoma Dept. of Central Services, 2002 OK 71, 55 P.3d 1072 (Okla. 2002); US West Communications, Inc. v. Wyoming Public Service Com'n, 907 P.2d 343 (Wyo. 1995).

4 § 54.

5 Martin v. State, Agency of Transp. Dept. of Motor Vehicles, 175 Vt. 80, 2003 VT 14, 819 A.2d 742 (2003).

6 State ex rel. Brant v. Bank of America, 272 Kan. 182, 31 P.3d 952 (2001); Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Commission, 403 So. 2d 13 (La. 1981).

7 Nolan v. U.S., 44 Fed. Cl. 49 (1999).

8 District of Columbia Office of Tax and Revenue v. Shuman, 82 A.3d 58 (D.C. 2013); Walsh v. Champaign County Sheriff's Merit Com'n, 404 Ill. App. 3d 933, 344 Ill. Dec. 826, 937 N.E.2d 1167 (4th Dist. 2010).
As to the rulemaking power of agencies, generally, see §§ 127 to 131.

9 Castro v. Viera, 207 Conn. 420, 541 A.2d 1216 (1988).

10 Diageo-Guinness USA, Inc. v. State Bd. of Equalization, 205 Cal. App. 4th 907, 140 Cal. Rptr. 3d 358 (3d Dist. 2012); Pereira v. State Bd. of Educ., 304 Conn. 1, 37 A.3d 625, 278 Ed. Law Rep. 347 (2012); Delgado v. Board of Election Com'rs of City of Chicago, 224 Ill. 2d 481, 309 Ill. Dec. 820, 865 N.E.2d 183 (2007).

11 District of Columbia v. Brookstowne Community Development Co., 987 A.2d 442 (D.C. 2010); Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc., 320 S.W.3d 912 (Tex. App. Austin 2010).

12 Southern New England Telephone Co. v. Department of Public Utility Control, 261 Conn. 1, 803 A.2d 879 (2002); In re Campaign for Ratepayers' Rights, 162 N.H. 245, 27 A.3d 726 (2011).

13 Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).

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§ 52. Limitations on manner of exercise

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 307

The power of an administrative agency must be exercised in accordance with and in the mode prescribed by the statute or other law bestowing such power.[1] Agency adjudicative power extends only to the ascertainment of facts and the application of existing law to the facts in order to resolve issues within areas of agency expertise.[2] Not only must powers be exercised in the manner directed but also by the officer specified.[3] One dealing with public officials, boards, or commissions must take notice of their authority to act, and the law charges him or her with the knowledge of any and all limitations upon such power.[4]

An agency may not assert the general power given to it and at the same time disregard the essential conditions imposed upon its exercise.[5] Thus, for example, the Federal Administrative Procedure Act states that a sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.[6] Regardless of how serious the problem an administrative agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.[7]

CUMULATIVE SUPPLEMENT

Cases:

Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Michigan v. E.P.A., 135 S. Ct. 2699 (2015).

[END OF SUPPLEMENT]

Footnotes

[1] U.S. v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 51 S. Ct. 159, 75 L. Ed. 359 (1931); Ethics Com'n of Town of Glastonbury v. Freedom of Information Com'n, 302 Conn. 1, 23 A.3d 1211 (2011).

[2] Mikel v. Pott Industries/St. Louis Ship, 896 S.W.2d 624 (Mo. 1995).

[3] Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); Roper v. Winner, 244 S.W.2d 355 (Tex. Civ. App. San Antonio 1951).

[4] Com. v. Whitworth, 74 S.W.3d 695 (Ky. 2002).

[5] Edgerton v. International Co., 89 So. 2d 488 (Fla. 1956); State ex rel. Public Service Commission v. Northern Pac. Ry. Co., 75 N.W.2d 129 (N.D. 1956).

[6] 5 U.S.C.A. § 558(b).

[7] Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002); Verizon v. F.C.C., 740 F.3d 623 (D.C. Cir. 2014).

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II. Administrative Agencies

C. Powers and Functions

1. In General

§ 53. Limitations on manner of exercise—Fundamental fairness and due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 301 to 303.1, 305

General due process considerations of fairness directly limit the manner in which an agency may exercise its designated responsibilities.[1]A practice which violates due process cannot be excused because of mere administrative inconvenience.[2]However, the full rights of due process present in a court of law do not automatically attach.[3]

An administrative agency's actions may be only investigatory, only adjudicatory, or a combination of both, and the due process that must be accorded in an administrative proceeding depends upon the nature of the administrative agency's actions.[4]The level of due process required in an administrative setting must be decided under the facts and circumstances of each case.[5]In addition, any administrative agency in determining how best to effectuate public policy is limited by principles of fundamental fairness.[6]There are no simple answers as to what constitutes fundamental fairness, and each case must be considered and evaluated on its merits, giving weight to the effect of the decision on the agency's public policy.[7]

Observation:

Under the *Mathews* balancing test to determine whether an administrative procedure satisfies due process, a court must weigh: (1) the private interest that will be affected by an official action; (2) the risk of erroneous deprivation of such interest or procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[8]

CUMULATIVE SUPPLEMENT

Cases:

The Supreme Court reviews the administrative proceedings to ensure procedural fairness at the administrative hearing; nonetheless, procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case. U.S.C.A. Const.Amend. 14. Schlittenhart v. North Dakota Dept. of Transp., 2015 ND 179, 2015 WL 4184107 (N.D. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Appeal of Morin, 140 N.H. 515, 669 A.2d 207 (1995); Appleby v. State ex rel. Wyoming Workers' Safety and Compensation Div., 2002 WY 84, 47 P.3d 613 (Wyo. 2002).

2 State ex rel. Ormet Corp. v. Industrial Com'n of Ohio, 54 Ohio St. 3d 102, 561 N.E.2d 920 (1990).

3 Medeiros v. Hawaii County Planning Com'n, 8 Haw. App. 183, 797 P.2d 59 (1990).

4 State ex rel. Hoover v. Smith, 198 W. Va. 507, 482 S.E.2d 124 (1997).

5 Bragunier Masonry Contractors, Inc. v. Maryland Com'r of Labor and Industry, 111 Md. App. 698, 684 A.2d 6 (1996).

6 State, Dept. of Environmental Protection v. Stavola, 103 N.J. 425, 511 A.2d 622 (1986); State ex rel. White v. Parsons, 199 W. Va. 1, 483 S.E.2d 1, 66 A.L.R.5th 737 (1996).

7 State, Dept. of Environmental Protection v. Stavola, 103 N.J. 425, 511 A.2d 622 (1986).

8 American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995).

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1. In General

§ 54. Implied and inherent powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 325

Generally, administrative agencies have the implied powers that are reasonably necessary in order to carry out the powers expressly granted.[1]The reason for an agency's implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency.[2]

Courts disagree as to how much latitude administrative agencies have with respect to implied powers. Some courts find wide latitude must be given to administrative agencies in fulfilling their duties.[3]Some of these courts even say that the authority does not have to be "necessary" to effectuate the expressly delegated authority but only "appropriate."[4]Other courts find that powers should not be extended by implication beyond what may be necessary for their just and reasonable execution.[5]Still other courts find that implied powers are "necessarily implied,"[6]meaning an implication which yields so strong a probability of intent to allow these powers that any intention to the contrary cannot be supposed.[7]

An administrative agency has no inherent powers[8]because any authority it has comes from statutes or the constitution.[9]Under some authority, however, implied powers may sometimes be called "inherent."[10]

Footnotes

1 Kaleikini v. Thielen, 124 Haw. 1, 237 P.3d 1067 (2010); Vickers v. Lowe, 150 Idaho 439, 247 P.3d 666 (2011); State ex rel. J.S., 202 N.J. 465, 998 A.2d 409 (2010); Texas Mun. Power Agency v. Public Utility Com'n of Texas, 253 S.W.3d 184 (Tex. 2007).
As to the express grant of powers, generally, see §§ 47, 51.

2 Kaleikini v. Thielen, 124 Haw. 1, 237 P.3d 1067 (2010); Vickers v. Lowe, 150 Idaho 439, 247 P.3d 666 (2011).

[3] Lake County Bd. of Review v. Property Tax Appeal Bd. of State of Ill., 119 Ill. 2d 419, 116 Ill. Dec. 567, 519 N.E.2d 459 (1988).

[4] Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 524 A.2d 386 (1987).

[5] State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

[6] Walker v. Arkansas State Bd. of Educ., 2010 Ark. 277, 365 S.W.3d 899, 280 Ed. Law Rep. 505 (2010); Sullivan Financial Group, Inc. v. Wrynn, 94 A.D.3d 90, 939 N.Y.S.2d 761 (3d Dep't 2012).

[7] Mississippi Public Service Com'n v. Columbus & Greenville Ry. Co., 573 So. 2d 1343 (Miss. 1990).

[8] Ethics Com'n of Town of Glastonbury v. Freedom of Information Com'n, 302 Conn. 1, 23 A.3d 1211 (2011); Dialysis Solution, LLC v. Mississippi State Dept. of Health, 31 So. 3d 1204 (Miss. 2010); Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Bd., 159 Wash. App. 148, 244 P.3d 1003 (Div. 1 2010).

[9] Belanger & Sons, Inc. v. Department of State, 176 Mich. App. 59, 438 N.W.2d 885 (1989).

[10] Jones v. Keller, 364 N.C. 249, 698 S.E.2d 49 (2010).

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C. Powers and Functions

1. In General

§ 55. Discretionary powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 324

Agencies generally are given broad discretion to exercise their regulatory authority.[1]While the right to exercise discretion is frequently conferred expressly,[2]the duties of administrative agencies also necessarily include the right to exercise discretion.[3]The rationale for agency discretion is that administrative bodies possess experience and specialization that place them at an advantage in making decisions within an agency's areas of expertise.[4]

An agency has broad discretion to determine when and how to hear and decide the matters that come before it,[5]as well as whether or not to prosecute or enforce, through either civil or criminal process.[6]The matter of recusal is generally left to the discretion of the adjudicator, and abuse of that discretion must be shown to reverse a decision not to allow a recusal.[7]Additionally, the decision whether or not to impose a sanction is discretionary.[8]

The question of how best to handle related, yet discrete, issues in terms of procedures is a matter committed to agency discretion.[9]Administrative agencies generally have wide discretion in selecting the means to fulfill the legislature's goals.[10]Administrative authorities are permitted, consistent with the obligations of due process, to adopt rules and policies to carry out statutory duties[11]and to adapt their rules and policies to the demands of changing circumstances.[12]

Observation:

By virtue of its specialized knowledge and authority, an administrative agency alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by the legislature and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.[13]

CUMULATIVE SUPPLEMENT

Cases:

Under the fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts, courts cannot impose limits on an agency's discretion that are not supported by the text of the statute. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

Where existing methodology or research in a new area of regulation is deficient, an administrative agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information. Center for Sustainable Economy v. Jewell, 779 F.3d 588 (D.C. Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

[1] Doe v. Sex Offender Registry Bd., 456 Mass. 612, 925 N.E.2d 533 (2010); Unified Sportsmen of Pennsylvania ex rel. their Members v. Pennsylvania Game Commission (PGC), 18 A.3d 373 (Pa. Commw. Ct. 2011).

[2] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954); Ex parte Anderson, 191 Or. 409, 229 P.2d 633, 29 A.L.R.2d 1051 (1951).

[3] I. C. C. v. Parker, 326 U.S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051 (1945); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950); State ex rel. Shafer v. Ohio Turnpike Commission, 159 Ohio St. 581, 50 Ohio Op. 465, 113 N.E.2d 14 (1953).

[4] Save Park County v. Board of County Com'rs of County of Park, 990 P.2d 35 (Colo. 1999).

[5] Tennessee Valley Mun. Gas Ass'n v. F.E.R.C., 140 F.3d 1085 (D.C. Cir. 1998).

[6] J.C. & Associates v. Board of Appeals and Review, 778 A.2d 296 (D.C. 2001).

[7] Herridge v. Board of Registration in Medicine, 420 Mass. 154, 648 N.E.2d 745 (1995).

[8] Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997); Larsen v. Commission on Medical Competency, 1998 ND 193, 585 N.W.2d 801 (N.D. 1998).

[9] Northern Border Pipeline Co. v. F.E.R.C., 129 F.3d 1315 (D.C. Cir. 1997).

[10] Zatz v. U.S., 149 F.3d 144 (2d Cir. 1998); County of Hudson v. Department of Corrections, 152 N.J. 60, 703 A.2d 268 (1997).

[11] Coalition For Fair and Equitable Regulation of Docks on Lake of the Ozarks v. F.E.R.C., 297 F.3d 771 (8th Cir. 2002); In re Public Service Elec. and Gas Company's Rate Unbundling, 167 N.J. 377, 771 A.2d 1163 (2001).

[12] In re Permian Basin Area Rate Cases, 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968).

[13] In re Morgan, 144 N.H. 44, 742 A.2d 101 (1999).

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1. In General

§ 56. Discretionary powers—Limitations on discretion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 305, 324

While deference is appropriately shown to agency action because of the expertise and superior knowledge of agencies in their specialized fields, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review.[1]Thus, the language in a rule allowing for agency discretion does not create unlimited discretion.[2]The discretion which is afforded to administrative agency discretion may not justify the agency in altering, modifying, or extending the reach of the law created by the legislature.[3]Discretion must be exercised according to fair and legal considerations,[4]in accordance with established principles of justice, and not arbitrarily or capriciously,[5]fraudulently, or without factual basis.[6]

Observation:

An agency which has been granted discretion by statute may limit its own discretion in its regulations.[7]

CUMULATIVE SUPPLEMENT

Cases:

First Amendment barred abortion providers and their supporters from recovering damages for abortion opponents' breach of

exhibit agreements flowing from opponents' publication of surreptitiously recorded conversations at providers' conferences and facilities and with providers' targeted staff, obtained through deception by opponents in effort to advance their goal of interfering with women's access to legal abortion, where those damages were caused by subsequent publication of videos and not from breach of agreements themselves. U.S. Const. Amend. 1. Planned Parenthood Federation of America, Inc. v. Center for Medical Progress, 402 F. Supp. 3d 615 (N.D. Cal. 2019).

[END OF SUPPLEMENT]

Footnotes

1 In re Kim, 403 N.J. Super. 378, 958 A.2d 485 (App. Div. 2008).

2 Inova Alexandria Hosp. v. Shalala, 244 F.3d 342 (4th Cir. 2001).

3 State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).

4 American Broadcasting Co. v. F.C.C., 179 F.2d 437 (D.C. Cir. 1949); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950).

5 Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403, 94 L. Ed. 381 (1950); State Bd. of Medical Examiners v. Beatty, 220 La. 1, 55 So. 2d 761 (1951); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950).

6 McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035, 123 A.L.R. 1205 (1939).

7 McBride v. Motor Vehicle Div. of Utah State Tax Com'n, 1999 UT 9, 977 P.2d 467 (Utah 1999).

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1. In General

§ 57. Ministerial powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 328

If an agency, through rulemaking, decides to remove discretion from its determinations, then it appropriately relegates to itself a ministerial role.[1] A ministerial duty is one in respect to which nothing is left to discretion. It is a simple, definite duty arising under conditions admitted or proved to exist and imposed by law.[2] It is a duty absolute, certain, and imperative, involving mere execution of a specific act arising from fixed and designated facts.[3]

The fact that a necessity may exist for the ascertainment of the facts or conditions, upon the existence of which the performance of an act becomes a clear and specific duty, does not convert a ministerial act into a discretionary one.[4]

Footnotes

1 Maryland Transit Admin. v. Surface Transp. Bd., 700 F.3d 139 (4th Cir. 2012).

2 Bronaugh v. Murray, 294 Ky. 715, 172 S.W.2d 591 (1943); Texas State Bd. of Dental Examiners v. Fieldsmith, 242 S.W.2d 213, 26 A.L.R.2d 990 (Tex. Civ. App. Dallas 1951), writ refused n.r.e.

3 People v. May, 251 Ill. 54, 95 N.E. 999 (1911); State ex rel. School Dist. of Scottsbluff v. Ellis, 163 Neb. 86, 77 N.W.2d 809 (1956).
As to the delegation of ministerial powers, see § 65.

4 Independent School Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W.2d 263 (1951); State ex rel. School Dist. of Scottsbluff v. Ellis, 163 Neb. 86, 77 N.W.2d 809 (1956).
As to discretionary powers, generally, see §§ 55, 56.

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1. In General

§ 58. Power to charge fees for services

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 327

A.L.R. Library

Measure of fees assessable by agency under 31 U.S.C.A. sec. 483a providing that federal agencies shall be self-sustaining to full extent possible, 51 A.L.R. Fed. 588

Congress has stated its intention that federal agencies (except mixed-ownership government corporations), in order to be self-sustaining to the extent possible, should be able to charge fees for each service or thing of value provided to a person (except a person on official business of the United States government).[1] This ability to charge "fees" does not include an ability to levy taxes.[2] Entire agencies are not among those who may be assessed since the statute reaches only to specific charges for specific services to specific individuals or companies.[3]

The head of each agency may prescribe regulations establishing the charge for a service or thing of value provided by the agency. These regulations are subject to policies prescribed by the President and must be as uniform as practicable. Each charge must be fair and based on the costs to the government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts.[4]

This power does not affect a law of the United States prohibiting the determination and collection of charges and the disposition of those charges and prescribing bases for determining charges although a charge may be redetermined under this provision consistent with the prescribed base.[5]

Footnotes

1 31 U.S.C.A. § 9701(a).

2 National Cable Television Ass'n, Inc. v. U. S., 415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974).

3 Federal Power Commission v. New England Power Co., 415 U.S. 345, 94 S. Ct. 1151, 39 L. Ed. 2d 383 (1974).

4 31 U.S.C.A. § 9701(b).

5 31 U.S.C.A. § 9701(c).

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C. Powers and Functions

2. Separation of Powers of Government

§ 59. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301

The doctrine of separation of powers declares that governmental powers are divided among the three separate and independent branches of government and broadly operates to distribute the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary. The doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them.[1]However, the doctrine of separation of powers is grounded in flexibility and practicality,[2]and administrative agencies combine to a certain extent the three powers of government.[3]Legislative authority may be delegated to an administrative body where sufficient standards are set forth in statutes[4]that establish the manner and circumstance of the exercise of such power.[5]Even broad delegations of authority are permissible under these circumstances.[6]

Nevertheless, the doctrine of separation of powers affects administrative agencies. It is one of the bases for the principle that courts may not usurp the functions of an administrative agency.[7]In addition, separation of powers may be violated where Congress tries to control the execution of its enactment directly instead of indirectly by passing new legislation.[8]Congress' authority to delegate portions of its powers to administrative agencies provides no support for the argument that Congress can constitutionally control the administration of the laws by way of a congressional veto.[9]

Observation:

States often, if not always, decide how power will be distributed among their governmental agencies,[10]and a state constitution may unite legislative and judicial powers in a single entity without constraint by the United States Constitution.[11]

CUMULATIVE SUPPLEMENT

Cases:

Department of Health (DOH) had statutory authority to adopt conflict-of-interest rule, prohibiting evaluator who determines a child's eligibility for early intervention services, and the private agency which employs the evaluator, from providing services to that child under contract with DOH, and did not violate separation of powers doctrine in promulgating it. McKinney's Public Health Law § 2550; McKinney's Public Health Law § 2544(3)(b); McKinney's Public Health Law § 2541(12); 10 NYCRR subpart 69–4. Agencies for Children's Therapy Services, Inc. v. New York State Dept. of Health, 22 N.Y.S.3d 524 (App. Div. 2d Dep't 2015).

[END OF SUPPLEMENT]

Footnotes

1 Am. Jur. 2d, Constitutional Law §§ 237, 238.

2 Am. Jur. 2d, Constitutional Law § 242.

3 Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944); Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956).
As to the status of agencies in this regard, generally, see §§ 24 to 26.

4 Kaufman v. State Dept. of Social and Rehabilitative Services, 248 Kan. 951, 811 P.2d 876 (1991); Sullivan v. Board of License Com'rs for Prince George's County, 293 Md. 113, 442 A.2d 558 (1982).
As to legislative standards governing administrative action, see § 48.

5 Kaufman v. State Dept. of Social and Rehabilitative Services, 248 Kan. 951, 811 P.2d 876 (1991).

6 Sullivan v. Board of License Com'rs for Prince George's County, 293 Md. 113, 442 A.2d 558 (1982).

7 American Trucking Ass'ns v. U.S., 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953).

8 Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986).

9 I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

10 Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

11 Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S. Ct. 445, 67 L. Ed. 731 (1923).

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2. Separation of Powers of Government

§ 60. Encroachment by agency on adjudicative functions of judicial branch

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301

The United States Constitution[1] and some state constitutions have provisions vesting judicial powers in the courts.[2] However, administrative agencies may make factual determinations and even adjudicate rights of the parties without running afoul of the constitutional separation of powers.[3] For instance, Congress can establish under Article I "legislative courts"[4] to serve as special tribunals to examine and determine various matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.[5]

Observation:

Under some authority, it is where an agency purports to enter enforceable judgments that the court has drawn the line of permissibility. This is so because it is the power to render enforceable judgments which is the essence of judicial power.[6] However, some statutes confer power to punish for civil contempt or imply a power to hold persons in criminal contempt.[7]

Footnotes

1 U.S. Const. Art. III, § 1.

2 Am. Jur. 2d, Courts § 5.

[3] Alakai Na Keiki, Inc. v. Matayoshi, 127 Haw. 263, 277 P.3d 988, 280 Ed. Law Rep. 450 (2012); State ex rel. Keasling by Keasling v. Keasling, 442 N.W.2d 118 (Iowa 1989).
As to administrative agencies as judicial bodies or courts, see §§ 24, 25.

[4] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

[5] Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

[6] State ex rel. Keasling by Keasling v. Keasling, 442 N.W.2d 118 (Iowa 1989).

[7] Kennedy v. Kenney Mfg. Co., 519 A.2d 585 (R.I. 1987).

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§ 61. Combining investigative, prosecutorial, and judicial powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301

Some administrative agencies investigate violations of the law and act as accusers or act as advocate or prosecutor as well as judge in the same proceeding.[1]It is typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the administrative procedure act, and it does not violate due process of law.[2]

Observation:

When the legislature gives decision-making authority to an administrative board without violating the separation of powers doctrine embodied in the constitution, that board has a dual character in which some of its acts are within the legislative or administrative area, and others have the effect of a judgment. Such an administrative board is permitted to resolve issues of fact and render decisions affecting private rights that have the same force of obligation and finality as judicial ones.[3]

The danger of unfairness is particularly great in an agency in which there is a high degree of concentration of both prosecuting and judicial functions.[4]Nevertheless, the combination of functions has not been held to violate constitutional rights, such as due process of law,[5]or to deny a fair hearing.[6]However, the interested party in such a case must have the right to cross-examine witnesses and present proof,[7]and a court may determine from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.[8]

Footnotes

1 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); People v. Western Air Lines, 42 Cal. 2d 621, 268 P.2d 723 (1954); Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).
As to the status of agencies in this regard, generally, see §§ 24 to 26.

2 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

3 McKay v. New Hampshire Compensation Appeals Bd., 143 N.H. 722, 732 A.2d 1025 (1999).

4 Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (1954).
As to the separation of prosecutorial or investigative and adjudicative functions, see §§ 303, 304.

5 Morongo Band of Mission Indians v. State Water Resources Control Bd., 45 Cal. 4th 731, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009).

6 Matter of Permits to Drain related to Stone Creek Channel Improvements and White Spur Drain, 424 N.W.2d 894 (N.D. 1988).

7 Matter of Carberry, 114 N.J. 574, 556 A.2d 314 (1989).

8 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions.[1]Statutes often expressly provide for such delegation by the persons in whom the powers of the agency are directly vested.[2]

The authority to subdelegate need not be expressed in the statute but may be implied if there is a reasonable basis for such implication.[3]However, state courts, in specific instances, have found that the statutory authority of a commission to employ persons as may be necessary to perform its duties does not give the commission authority, either directly or by implication, to deputize those matters which are quasi-judicial in character.[4]Moreover, under certain circumstances, the subdelegation of power may be beyond the scope of authority of an administrative agency or invalid on constitutional grounds.[5]

CUMULATIVE SUPPLEMENT

Cases:

A federal official's sub-delegation to a subordinate official is presumptively permissible, absent affirmative evidence in the original delegation of a contrary intent. Mobley v. C.I.A., 806 F.3d 568 (D.C. Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

[1] Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959); Pistachio Group of the Ass'n of Food Industries, Inc. v. U.S., 11 Ct. Int'l Trade 668, 671 F. Supp. 31 (1987).

[2] L.P. Steuart & Bro. v. Bowles, 322 U.S. 398, 64 S. Ct. 1097, 88 L. Ed. 1350 (1944); U. S. Health Club, Inc. v. Major, 292 F.2d 665 (3d Cir. 1961); Berkshire Life Ins. Co. v. Maryland Ins. Admin., 142 Md. App. 628, 791 A.2d 942 (2002).

[3] § 64.

[4] Apice v. American Woolen Co., 74 R.I. 425, 60 A.2d 865 (1948); State Tax Commission of Utah v. Katsis, 90 Utah 406, 62 P.2d 120, 107 A.L.R. 1477 (1936).

[5] Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960).

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§ 63. Delegation under federal law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

Pursuant to federal law, in addition to the authority to delegate conferred by other law, the head of an agency may delegate to subordinate officials the authority vested in him or her by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his or her agency,[1] as well as the authority to authorize the publication of advertisements, notices, or proposals.[2] Thus, for instance, agency heads may delegate the authority to issue and promulgate regulations dealing with the discharge of personnel.[3]

The failure of an executive order to name the office of one to whom authority is delegated does not vitiate that order if the person named is an officer appointed by the President and confirmed by the Senate.[4]

Footnotes

1 5 U.S.C.A. § 302(b)(1).

2 5 U.S.C.A. § 302(b)(2).

3 Reed v. Franke, 297 F.2d 17 (4th Cir. 1961).

4 U.S. v. Chemical Foundation, 272 U.S. 1, 47 S. Ct. 1, 71 L. Ed. 131 (1926).

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§ 64. Delegation implied from statute or nature of agency

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

The authority to subdelegate need not be expressed in the statute but may be implied if there is a reasonable basis for such implication.[1]The authority of an agency to delegate a particular function may be found in the power conferred upon an agency to issue regulations or orders as may be deemed necessary or proper in order to carry out its purposes unless by express provision of the statute or by implication it has been withheld.[2]In addition, the authority of an administrative agency to delegate its powers, including its discretionary or quasi-judicial powers, to subordinates within the agency may be implied from the nature of the agency.[3]

Where Congress confers power upon the President of the United States, even if there is no express authority to act by deputies, such authority is implied.[4]Powers bestowed upon the President must, of necessity, be exercised through the various executive departments.[5]Moreover, the necessity of performance of duties in the federal executive departments through subordinates is recognized, and acts of an acting secretary[6]or an assistant secretary[7]or other subordinates[8]are deemed to be acts of the secretary when they are done under his or her sanction and approval.

The same principles have been applied to uphold delegations by lesser federal[9]and by state[10]administrative agencies which, in view of the magnitude of their tasks, are deemed not to have been intended to exercise their discretion personally; further, the same principles which will admit of delegation by an administrative agency in any case may suffice to justify a redelegation by its delegate.[11]

Footnotes

1 Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960).
As to implied powers, generally, see § 54.

[2] Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 67 S. Ct. 1129, 91 L. Ed. 1375 (1947).
An agency may impliedly delegate administrative authority if it is consistent with the legislative purpose. Santaniello v. New Jersey Dept. of Health and Senior Services, 416 N.J. Super. 445, 5 A.3d 804 (App. Div. 2010).

[3] Kimm v. Rosenberg, 363 U.S. 405, 80 S. Ct. 1139, 4 L. Ed. 2d 1299 (1960).

[4] Shreveport Engraving Co. v. U.S., 143 F.2d 222 (C.C.A. 5th Cir. 1944).

[5] U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S. Ct. 309, 94 L. Ed. 317 (1950).

[6] Morgan v. U.S., 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

[7] Hannibal Bridge Co v. U S, 221 U.S. 194, 31 S. Ct. 603, 55 L. Ed. 699 (1911).

[8] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954).

[9] Louisiana Forestry Ass'n Inc. v. Secretary U.S. Dept. of Labor, 745 F.3d 653 (3d Cir. 2014); Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950).

[10] Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848 (5th Cir. 1957).

[11] Shreveport Engraving Co. v. U.S., 143 F.2d 222 (C.C.A. 5th Cir. 1944).

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§ 65. Type of power, as affecting whether power may be delegated

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

In all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied.[1] Accordingly, apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial or discretionary or quasi-judicial in nature.[2] Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized,[3] but there generally is no authority to delegate acts discretionary or quasi-judicial in nature.[4]

CUMULATIVE SUPPLEMENT

Cases:

When Labor Commission, through its administrative law judges (ALJs), acts in quasi-judicial role in workers' compensation cases, it cannot delegate its adjudicative authority without running afoul of provision in Utah Constitution, stating that judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the legislature by statute may establish. Utah Const. art. 8, § 1. Ramos v. Cobblestone Centre, 2020 UT 55, 472 P.3d 910 (Utah 2020).

[END OF SUPPLEMENT]

Footnotes

[1] Anderson v. Grand River Dam Authority, 1968 OK 143, 446 P.2d 814 (Okla. 1968).

[2] Riverhead Park Corp. v. Cardinale, 881 F. Supp. 2d 376 (E.D. N.Y. 2012) (applying New York law); Washington Federation of State Employees v. State Dept. of General Admin., 152 Wash. App. 368, 216 P.3d 1061 (Div. 2 2009). As to the distinction between discretionary and ministerial powers, see §§ 55, 57.

[3] Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848 (5th Cir. 1957); School Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W. 407, 135 A.L.R. 1081 (1941).

[4] Riverhead Park Corp. v. Cardinale, 881 F. Supp. 2d 376 (E.D. N.Y. 2012) (applying New York law); Gabrilson v. Flynn, 554 N.W.2d 267, 113 Ed. Law Rep. 894 (Iowa 1996).

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§ 66. Delegation to private parties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 318, 322.1, 323, 331

When Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor,[1] and such delegations to nongovernmental entities may be assumed to be improper absent an affirmative showing of congressional authorization.[2] Delegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on the grounds of conflict of interest.[3] An agency abdicates its role as a rational decision maker if it does not exercise its own judgment and instead cedes near total deference to private parties' estimates even if the parties agree unanimously as to the estimated amount.[4] However, subdelegations by federal agencies to private parties are not invalid if the federal agency or official retains final reviewing authority.[5]

Observation:

Whether a state agency may exercise internal management discretion and determine to perform its constitutional or statutory duty using an independent contractor depends upon whether the agency possesses express or implied authority to make such a decision in a particular circumstance.[6]

Footnotes

[1] Perot v. Federal Election Com'n, 97 F.3d 553 (D.C. Cir. 1996).

[2] Gentiva Healthcare Corp. v. Sebelius, 723 F.3d 292 (D.C. Cir. 2013).

[3] Pistachio Group of the Ass'n of Food Industries, Inc. v. U.S., 11 Ct. Int'l Trade 668, 671 F. Supp. 31 (1987).

[4] Texas Office of Public Utility Counsel v. F.C.C., 265 F.3d 313 (5th Cir. 2001).

[5] United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

[6] Oklahoma Public Employees Ass'n v. Oklahoma Dept. of Central Services, 2002 OK 71, 55 P.3d 1072 (Okla. 2002).

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 316, 428 to 437

Administrative agencies are generally clothed with the power to construe the law as a necessary precedent to administrative action.[1]Even so, it is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable[2]and has no authority to invalidate a statute on constitutional grounds or to question its validity.[3]

Observation:

An administrative agency has the power and the duty to interpret its own legislative rules just as it has the power and duty to interpret the statutes that it enforces.[4]

Agencies cannot by interpretation enlarge the scope of or change a properly enacted statute.[5]An agency cannot modify, abridge, or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power.[6]Although an administrative agency has the authority and duty to determine its own limits of statutory authority, it is the function of the judiciary to finally decide the limits of the authority of the agency.[7]

CUMULATIVE SUPPLEMENT

Cases:

Where Congress has explicitly provided a definition for a term, and that definition is clear, an agency must follow it when exercising its discretion. Safer Chemicals, Healthy Families v. U.S. Environmental Protection Agency, 943 F.3d 397 (9th Cir. 2019), for additional opinion, see, 2019 WL 6041996 (9th Cir. 2019).

To determine whether the Legislature clearly vested an agency with authority to interpret particular statutes, the appellate court considers the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations as well as the functions of and duties imposed on the agency. Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015).

[END OF SUPPLEMENT]

Footnotes

[1] City of North Las Vegas v. State Local Government Employee-Management Relations Bd., 261 P.3d 1071, 127 Nev. Adv. Op. No. 57 (Nev. 2011); J.R. Simplot Co., Inc. v. Idaho State Tax Com'n, 120 Idaho 849, 820 P.2d 1206 (1991); Dean v. State, 250 Kan. 417, 826 P.2d 1372 (1992).

[2] Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987); HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 736 P.2d 1271 (1987).

[3] Delgado v. Board of Election Com'rs of City of Chicago, 224 Ill. 2d 481, 309 Ill. Dec. 820, 865 N.E.2d 183 (2007); In re Worker's Compensation Claim of Shryack, 3 P.3d 850 (Wyo. 2000).
As to constitutional questions and claims before agencies, see § 68.

[4] Hoctor v. U.S. Dept. of Agriculture, 82 F.3d 165 (7th Cir. 1996).

[5] Metheny v. Hammonds, 216 F.3d 1307 (11th Cir. 2000) (applying Georgia law); Ex parte State Health Planning and Development Agency, 855 So. 2d 1098 (Ala. 2002); United Ass'n Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd., 199 Cal. App. 4th 273, 131 Cal. Rptr. 3d 74 (3d Dist. 2011).

[6] Castro v. Viera, 207 Conn. 420, 541 A.2d 1216 (1988).

[7] Moderate Income Housing, Inc. v. Board of Review of Pottawattamie County, 393 N.W.2d 324 (Iowa 1986).

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§ 68. Constitutional questions and claims before agencies

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 316, 430

As a general rule, administrative agencies have no jurisdiction to decide issues of constitutional law.[1] The power delegated by the legislature to an agency generally does not include the inherent authority to decide whether a particular statute or regulation that the agency is charged with enforcing is constitutional.[2]

While some courts have declared that challenges to the constitutionality of a statute or regulation promulgated by an agency are generally beyond the power or jurisdiction of the agency,[3] other courts have found that administrative agencies may consider constitutional claims, although they lack the authority to deal with them dispositively, as the final say on constitutional matters rests with the courts.[4] Yet other authority has found that administrative agencies have the power to declare statutes and rules unconstitutional, when done with care,[5] or that administrative agencies have the power to pass on constitutional questions where relevant and necessary to the resolution of a question concededly within their jurisdiction.[6]

Footnotes

1 Reed v. Arvis Harper Bail Bonds, Inc., 2010 Ark. 338, 368 S.W.3d 69 (2010); Stinemetz v. Kansas Health Policy Authority, 45 Kan. App. 2d 818, 252 P.3d 141 (2011).

2 Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).
As a rule, an administrative agency lacks authority to decide the constitutionality of a statute. Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012).

3 Gilbert v. National Transp. Safety Bd., 80 F.3d 364 (9th Cir. 1996).

[4] Singh v. Reno, 182 F.3d 504 (7th Cir. 1999), as amended on other grounds on denial of reh'g, (Aug. 10, 1999).

[5] Outdoor Media Dimensions Inc. v. State, 331 Or. 634, 20 P.3d 180 (2001).

[6] New Jersey Dept. of Envir. Prot. v. Huber, 213 N.J. 338, 63 A.3d 197 (2013).

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§ 69. Purpose of administrative interpretation; clarifying ambiguity

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430, 432

When there is internal conflict in a statute's mandates, the job of the agency administrator is to implement the central aim of the statute.[1] When a legislative prescription is ambiguous, the administrator of such a statute must choose between conflicting reasonable interpretations.[2] Although the secretary of an executive department is free to adopt a reasonable interpretation of an ambiguous statute, the secretary is not free to disregard an unambiguous aspect of a statute to clarify and effect an ambiguous one.[3]

Caution:

Ambiguity anywhere in a statute is not a license to the administrative agency that interprets the statute to roam about that statute looking for other provisions to narrow or expand through the process of definition; rather, the delegated authority to interpret an ambiguous statutory term extends only to the specific subject matter covered by the ambiguous term.[4]

In order to justify construction by either an administrative agency or court, it must first appear that construction is necessary,[5] for while administrative agencies have the authority to interpret the laws which they administer, such interpretation cannot be contrary to clear legislative intent.[6] An unambiguous statute may not be supplemented[7] or altered[8] in the guise of interpretation. If the intent of a statute is clear, both the court and the agency charged with administering the statute must give effect to the unambiguously expressed will of the legislature.[9]

CUMULATIVE SUPPLEMENT

Cases:

When an administrative agency's interpretation of a statute is inconsistent with the statute itself, or when the statute is unambiguous, such administrative interpretation carries little weight. Lancaster County v. Pennsylvania Labor Relations Bd., 124 A.3d 1269 (Pa. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Massachusetts ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23 (1st Cir. 1999).

2 Holly Farms Corp. v. N.L.R.B., 517 U.S. 392, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996).

3 Mt. Emmons Min. Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997).

4 Bower v. Federal Exp. Corp., 96 F.3d 200, 17 A.D.D. 735, 1996 FED App. 0306P (6th Cir. 1996).

5 Cullinan v. McColgan, 80 Cal. App. 2d 976, 183 P.2d 115 (3d Dist. 1947).

6 Abramson v. Florida Psychological Ass'n, 634 So. 2d 610 (Fla. 1994).
Administrative orders and rules that are contrary to legislative intent must be rejected. Dababnah v. West Virginia Bd. of Medicine, 207 W. Va. 621, 535 S.E.2d 220 (2000).

7 Cullinan v. McColgan, 80 Cal. App. 2d 976, 183 P.2d 115 (3d Dist. 1947).

8 Helvering v. Sabine Transp. Co., 318 U.S. 306, 63 S. Ct. 569, 87 L. Ed. 773 (1943); In re Loeb's Estate, 400 Pa. 368, 162 A.2d 207 (1960).

9 American Federation of Government Employees v. Rumsfeld, 262 F.3d 649 (7th Cir. 2001); Haug v. Bank of America, N.A., 317 F.3d 832 (8th Cir. 2003).

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§ 70. Requirement that agency follow courts; nonacquiescence

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430

Federal agencies are required to abide by the law of the relevant federal judicial circuit in matters arising within the jurisdiction of that circuit's court of appeals until and unless it is changed by that court of appeals or reversed by the United States Supreme Court.[1] In order to establish agency nonacquiescence, the evidence must demonstrate that the agency has deliberately failed to follow the law of the circuits whose courts have jurisdiction over the cause of action. Where the agency does not formally announce that it will nonacquiesce in a particular decision, the agency's conduct cannot be considered nonacquiescence unless there are substantial differences between agency policy and court holdings and unless these differences have influenced the agency's adjudication of individual cases.[2]

Observation:

Despite the rule regarding the obligation of agencies to follow court precedent, an agency does not have to incorporate dicta as policy, nor does it have to apply a holding beyond the scope of the decision itself. In addition, if the agency finds a principled distinction between a particular set of factual circumstances and the case in which the court articulated its holding, and if the agency believes in good faith that the decision should not be applied in those circumstances, it is entitled to set out the circumstances where the decision would be controlling and where the agency has decided it should not be applied.[3]

Caution:

An agency is bound to follow higher authority only when it acts as an adjudicator and not when it litigates.[4]

Footnotes

1 Industrial TurnAround Corp. v. N.L.R.B., 115 F.3d 248 (4th Cir. 1997).

2 Stieberger v. Sullivan, 738 F. Supp. 716 (S.D. N.Y. 1990).

3 Stieberger v. Sullivan, 738 F. Supp. 716 (S.D. N.Y. 1990).

4 National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365 (Fed. Cir. 2001).

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§ 71. Methods of interpretation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430

The power of an administrative agency to construe and interpret the law is applied in several different ways. The administrative agencies may interpret and construe the law through issuing rules and regulations.[1]An administrative agency may also render interpretations of the law in the course of exercising its adjudicating powers.[2]When, as an incident to its adjudicatory function, an agency interprets a statute, it may apply that new interpretation in the proceeding before it.[3]

As an alternative to acting formally through rulemaking or adjudication, administrative agencies may act informally.[4]In fact, informal action constitutes the bulk of the activity of most administrative agencies.[5]It is action that is neither adjudication nor rulemaking and includes investigating, publicizing, planning, and supervising a regulated industry.[6]In addition, an agency may, even without the statutory authorization to do so, specifically issue interpretations, rulings, or opinions upon the law it administers.[7]

Observation:

The various kinds of action can overlap, and the line between agency rulemaking and adjudication on the one hand and informal action on the other can become blurred.[8]

Footnotes

1 § 127.

2 § 258.

3 Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074 (D.C. Cir. 1987).

4 R & R Marketing, L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 729 A.2d 1 (1999).

5 Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 524 A.2d 386 (1987).

6 Northwest Covenant Medical Center v. Fishman, 167 N.J. 123, 770 A.2d 233 (2001).

7 Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944); Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176 (1944).

8 Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 524 A.2d 386 (1987).

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§ 72. Effect of interpretation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 430, 435

Construction and interpretation by an administrative agency of the law under which it acts provide a practical guide as to how the agency will seek to apply the law.[1] An agency to which the legislative branch has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.[2] However, despite the fact that the interpretation given to statutes and regulations by administrative agencies is given great weight by the courts,[3] one who chooses to rely upon an interpretative regulation does so at his or her own peril and stands the risk of its not being followed by the courts.[4] An erroneous construction of a statute by a state department cannot operate to confer a legal right in accordance with such construction.[5]

Footnotes

1 Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

2 City of Albuquerque v. New Mexico Public Regulation Com'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297 (2003).

3 § 74.

4 Sawyer v. Central Louisiana Elec. Co., 136 So. 2d 153 (La. Ct. App. 3d Cir. 1961); Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176 (1944).

5 Department of Insurance of Indiana v. Church Members Relief Ass'n, 217 Ind. 58, 26 N.E.2d 51, 128 A.L.R. 635 (1940).

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§ 73. Change in construction

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West's Key Number Digest, Administrative Law and Procedure 303.1, 430, 434, 435

A construction of a statute by those administering it, even though long continued, is not binding on them or their successors if thereafter they become satisfied that a different construction should be given.[1]This is especially true where the earlier construction was clearly erroneous[2]but also applies when the prior construction is merely no longer sound or appropriate.[3]Agencies have leeway to change their interpretations of laws, as well as of their own regulations, provided they explain the reasons for such change and provided that those reasons meet the applicable standard of review.[4]While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting some reasoned analysis.[5]An agency may change its interpretation of an underlying statutory provision even absent any alteration in that provision so long as the reason for the change is explained, and the change does not conflict with the underlying statute.[6]

Footnotes

1 Alstate Const. Co. v. Durkin, 345 U.S. 13, 73 S. Ct. 565, 97 L. Ed. 745 (1953); Faingnaert v. Moss, 295 N.Y. 18, 64 N.E.2d 337 (1945).

2 Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 (1962).

3 New York Tel. Co. v. F. C. C., 631 F.2d 1059 (2d Cir. 1980).

4 Saint Fort v. Ashcroft, 329 F.3d 191 (1st Cir. 2003).

5 Huntington Hosp. v. Thompson, 319 F.3d 74 (2d Cir. 2003).

[6] Paralyzed Veterans of America v. Secretary of Veterans Affairs, 345 F.3d 1334 (Fed. Cir. 2003).

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§ 74. Generally; deference rule

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Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court, 3 A.L.R. Fed. 2d 25

Generally, permissible[1] constructions given to ambiguous statutes[2] by agencies responsible for their administration are entitled to great weight[3] or deference[4] by the courts if neither irrational[5] nor unreasonable.[6] Reviewing courts must respect the judgment of an agency empowered to apply an ambiguous law to varying fact patterns even if the issue, with equal reason, is capable of being resolved one way rather than another.[7]

Observation:

A court must defer to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority, that is, its jurisdiction; no matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.[8]

On the other hand, where the administrative construction is manifestly wrong or clearly erroneous,[9] arbitrary,[10] or unreasonable,[11] it is not binding and will not be followed.

In any event, the construction of statutes and other laws is a matter which ultimately is for the courts.[12]

CUMULATIVE SUPPLEMENT

Cases:

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable, and this principle is implemented by the two-step analysis set forth in *Chevron*. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

Administrative interpretations of statutory provisions qualify for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Anna Jacques Hosp. v. Burwell, 797 F.3d 1155 (D.C. Cir. 2015).

When a provision of law vests interpretive discretion in an agency, court may reverse only if the agency's interpretation was irrational, illogical, or wholly unjustifiable. Iowa Code Ann. § 17A.19(10)(l). United Electrical, Radio & Machine Workers of America v. Iowa Public Employment Relations Board, 928 N.W.2d 101 (Iowa 2019).

For purposes of giving weight to the positions of administrative agencies, it does not matter whether an agency has been consistent in its rulings; this is because an agency's prior rulings and policies themselves are not entitled to great weight, unless expressed in regulations. Nielsen Co. (US), LLC v. County Bd. of Arlington County, 767 S.E.2d 1 (Va. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

2 Presley v. Etowah County Com'n, 502 U.S. 491, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1992); Eid v. Thompson, 740 F.3d 118 (3d Cir. 2014); Combs v. Chapal Zenray, Inc., 357 S.W.3d 751 (Tex. App. Austin 2011), reh'g overruled, (Jan. 25, 2012) and review denied, (Dec. 14, 2012).

3 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); Fishburn v. Indiana Public Retirement System, 2 N.E.3d 814 (Ind. Ct. App. 2014); Avenue Nursing Home and Rehabilitation Centre v. Shah, 112 A.D.3d 1178, 977 N.Y.S.2d 774 (3d Dep't 2013).

4 Negusie v. Holder, 555 U.S. 511, 129 S. Ct. 1159, 173 L. Ed. 2d 20 (2009); Nativi v. Deutsche Bank National Trust Company, 223 Cal. App. 4th 261, 167 Cal. Rptr. 3d 173 (6th Dist. 2014), review denied, (Apr. 30, 2014); Federal Nat. Mortg. Ass'n v. Sundquist, 2013 UT 45, 311 P.3d 1004 (Utah 2013), petition for certiorari filed, 82 U.S.L.W. 3453 (U.S. Jan. 14, 2014).

5 Democko v. Iowa Dept. of Natural Resources, 840 N.W.2d 281 (Iowa 2013); Lumpkin v. Department of Social Services, 45 N.Y.2d 351, 408 N.Y.S.2d 421, 380 N.E.2d 249 (1978).

[6] Presley v. Etowah County Com'n, 502 U.S. 491, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1992); Federal Nat. Mortg. Ass'n v. Sundquist, 2013 UT 45, 311 P.3d 1004 (Utah 2013), petition for certiorari filed, 82 U.S.L.W. 3453 (U.S. Jan. 14, 2014).

[7] Holly Farms Corp. v. N.L.R.B., 517 U.S. 392, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996).

[8] City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863 (2013).

[9] Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 78 S. Ct. 851, 2 L. Ed. 2d 926 (1958); Iowa Federation of Labor, AFL-CIO v. Iowa Dept. of Job Service, 427 N.W.2d 443 (Iowa 1988); Durrett v. Bryan, 14 Kan. App. 2d 723, 799 P.2d 110 (1990).

[10] Eid v. Thompson, 740 F.3d 118 (3d Cir. 2014); In re S.H., 2013 PA Super 165, 71 A.3d 973 (2013), appeal denied, 80 A.3d 778 (Pa. 2013).

[11] Crittenden v. Cook County Com'n of Human Rights, 2013 IL 114876, 371 Ill. Dec. 783, 990 N.E.2d 1161 (Ill. 2013); Avenue Nursing Home and Rehabilitation Centre v. Shah, 112 A.D.3d 1178, 977 N.Y.S.2d 774 (3d Dep't 2013).

[12] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); Hollinrake v. Iowa Law Enforcement Academy, Monroe County, 452 N.W.2d 598 (Iowa 1990); Durrett v. Bryan, 14 Kan. App. 2d 723, 799 P.2d 110 (1990).

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§ 75. “Practical” construction

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West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 303.1, 431, 433

Practical construction, as distinguished from judicial construction, is the interpretation put upon statutes by the actual administration of them by government departments.[1] The practical construction placed on a statute by an agency, if reasonable, is highly persuasive.[2] An actual,[3] proven[4] construction by the administrative agency[5] subsequent to the adoption of a statute[6] is essential to invoke the rule that the courts will give weight to a practical construction by administrative agencies in determining the true meaning of a statute.[7] On the other hand, the court may decline to give force to a construction represented by acts insufficient in rank, frequency, and duration to constitute a settled practice.[8]

Footnotes

1 Department of Insurance of Indiana v. Church Members Relief Ass’n, 217 Ind. 58, 26 N.E.2d 51, 128 A.L.R. 635 (1940).

2 Wiese v. Freedom of Information Com’n, 82 Conn. App. 604, 847 A.2d 1004, 187 Ed. Law Rep. 933 (2004).

3 Railroad Commission v. Houston Natural Gas Corp., 186 S.W.2d 117 (Tex. Civ. App. Austin 1945), writ refused w.o.m.

4 Hunstock v. Estate Development Corp., 22 Cal. 2d 205, 138 P.2d 1, 148 A.L.R. 968 (1943).

5 E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P.2d 324 (1946).

6 U.S. v. Townsley, 323 U.S. 557, 65 S. Ct. 413, 89 L. Ed. 454 (1945).

[7] Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250, 56 Ed. Law Rep. 1008 (N.D. 1989).

[8] Manning v. Seeley Tube & Box Co. of New Jersey, 338 U.S. 561, 70 S. Ct. 386, 94 L. Ed. 346 (1950); In re Porterfield, 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946).

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§ 76. General limitations on deference

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West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 431 to 433

The deference granted an agency's interpretation of a statute is not absolute.[1]There are general limitations on deference, including—
— the statute must be one subject to construction, that is, ambiguous.[2]
— judicial construction must be wanting.[3]
— the administrative construction must be decisive of the interpretation proposed to the court.[4]
— the administrative construction must be confidently asserted.[5]
— the administrative construction must be made in the discharge of official duty.[6]
— the administrative construction must be reasonable.[7]
— the administrative construction must not enlarge nor restrict the scope of the statute.[8]
— the administrative construction must not conflict with the expressed purpose of the statute and the intention of the legislature.[9]
The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.[10]Thus, the judiciary must reject administrative constructions which are contrary to clear congressional intent,[11]such as where the legislative history or the purpose and structure of the statute clearly reveal a contrary legislative intent.[12]

CUMULATIVE SUPPLEMENT

Cases:

Chevron deference is not warranted where the regulation is procedurally defective, that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

A party might be foreclosed in some instances from challenging the procedures used by an agency to promulgate a given rule, but where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice, and an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

Unexplained inconsistency between agency actions is a reason for holding an agency's interpretation to be an arbitrary and capricious change under the Administrative Procedure Act (APA). Western Watersheds Project v. Bernhardt, 428 F. Supp. 3d 327 (D. Or. 2019).

[END OF SUPPLEMENT]

Footnotes

[1] Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193 (Fla. 1st DCA 1991).

[2] Haggar Co. v. Helvering, 308 U.S. 389, 60 S. Ct. 337, 84 L. Ed. 340 (1940); Combs v. Chapal Zenray, Inc., 357 S.W.3d 751 (Tex. App. Austin 2011), reh'g overruled, (Jan. 25, 2012) and review denied, (Dec. 14, 2012).

[3] Sanford's Estate v. Commissioner of Internal Revenue, 308 U.S. 39, 60 S. Ct. 51, 84 L. Ed. 20 (1939); E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P.2d 324 (1946).

[4] Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949).

[5] Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 81 S. Ct. 1611, 6 L. Ed. 2d 869 (1961).

[6] State v. Mutual Life Ins. Co. of New York, 175 Ind. 59, 93 N.E. 213 (1910).

[7] Stewart Park and Reserve Coalition, Inc. (SPARC) v. Slater, 352 F.3d 545 (2d Cir. 2003); Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269, 153 A.L.R. 1054 (1944).

[8] Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534 (1945); Ex parte State Health Planning and Development Agency, 855 So. 2d 1098 (Ala. 2002).

[9] Harris v. Alcoholic Beverage Control Appeals Bd., 228 Cal. App. 2d 1, 39 Cal. Rptr. 192 (2d Dist. 1964); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 52 A.L.R.2d 875 (1955).

[10] K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988).

[11] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

[12] Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 105 S. Ct. 1102, 84 L. Ed. 2d 90 (1985); In re Township of Warren, 132 N.J. 1, 622 A.2d 1257 (1993).

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§ 77. Implied legislative approval of administrative construction

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Reenactment of a statutory provision without material change indicates legislative approval of its administrative construction.[1] This is especially true where there are repeated reenactments, as in the case of the former federal revenue acts;[2] where the administrative construction has also had judicial approval;[3] or where there is evidence that the legislature considered the administrative history of the statute or was advised of the construction[4] as where there is a long-standing interpretation of the statute by the agency.[5]

The legislature may also adopt an administrative construction of a statute when, subsequent to such construction, it amends the statute.[6] A congressional failure to revise or repeal an agency's interpretation of a statute when amending that statute is persuasive evidence that the interpretation is the one intended by Congress.[7]

CUMULATIVE SUPPLEMENT

Cases:

Re-enactment doctrine, by which Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt it when re-enacting a statute without change, is merely an interpretive tool fashioned by the courts for their own use in construing an ambiguous legislation. Mize v. Pompeo, 482 F. Supp. 3d 1317 (N.D. Ga. 2020).

Consideration of the principle that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change is secondary to consideration of the text of the statute itself and inapplicable where the court has already found the statutory language itself to be sufficient to establish

its clear meaning. Kiviti v. Pompeo, 467 F. Supp. 3d 293 (D. Md. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Helvering v. Wilshire Oil Co., 308 U.S. 90, 60 S. Ct. 18, 84 L. Ed. 101 (1939); Fajardo v. U.S. Atty. Gen., 659 F.3d 1303 (11th Cir. 2011); Wilson v. State, 272 S.W.3d 686 (Tex. App. Austin 2008).

2 Cammarano v. U.S., 358 U.S. 498, 79 S. Ct. 524, 3 L. Ed. 2d 462 (1959).

3 N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 71 S. Ct. 337, 95 L. Ed. 337 (1951).

4 Service v. Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957).

5 Federal Deposit Ins. Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 106 S. Ct. 1931, 90 L. Ed. 2d 428 (1986).

6 Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958); In re Stupack, 274 N.Y. 198, 8 N.E.2d 485, 110 A.L.R. 1158 (1937).

7 Young v. Community Nutrition Institute, 476 U.S. 974, 106 S. Ct. 2360, 90 L. Ed. 2d 959 (1986).

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§ 78. Effect of subsequent acts of legislature

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West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 435, 436

The courts will not apply an administrative construction which has been prohibited by subsequent legislative enactments of the same nature.[1] However, the legislature may adopt an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction.[2] Ratification with positive legislation makes an administrative construction virtually conclusive,[3] and reenactment of a statute is persuasive evidence of legislative approval.[4]

Footnotes

1 U.S. v. Gilmore, 75 U.S. 330, 19 L. Ed. 396, 1869 WL 11571 (1869).

2 § 77.

3 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

4 C.I.R. v. Sternberger's Estate, 348 U.S. 187, 75 S. Ct. 229, 99 L. Ed. 246 (1955).

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